STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Wisniewski,

Petitioner,

vs.

NO: 10 WC 35835

14IWCC0351

Estes Express Lines,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, medical expenses, prospective medical care and whether the L4-L5 disc herniation is causally related and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

The Commission affirms the Arbitrator's finding that a causal relationship exists for the left gluteal hematoma, contusions and back pain and affirms the Arbitrator's finding that Petitioner failed to prove a causal relationship exists for his L4-L5 disc herniation and right-sided radicular pain and need for surgery. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $846.26 per week for a period of 9-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $6,924.32 in TTD benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 05 2014
MB/maw
o03/06/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

WIESNEWSKI, RONALD
Employee/Petitioner

Case# **10WC035835**

11WC017794

14IWCC0351

ESTES EXPRESS LINES
Employer/Respondent

On 7/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2333 WOODRUFF JOHNSON & PALERMO
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1109 GAROFALO SCHREIBER & HART ET AL
JOSEPH GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ronald Wisniewski
Employee/Petitioner

v.

Estes Express Lines
Employer/Respondent

Case # **10** WC **35835**

Consolidated cases: **11WC17794**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **11/2/2012 & 11/21/2012**
. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **2/29/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being with regard to his L4-L5 disc herniation ***is not*** causally related to the accident, although the left gluteal hematoma, contusions and back pain are causally related to such accident.

In the year preceding the injury, Petitioner earned **$66,008.28**; the average weekly wage was **$1,269.39**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$6,924.32** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

Petitioner is entitled to TTD benefits from **3/1/2008** through **5/4/2008**, or **9-2/7**weeks. (Arb.'s Ex 1)

ORDER

The Arbitrator has found that Petitioner's left gluteal hematoma, contusions and back pain are causally related to the accident. However, as the Arbitrator has found that the L4-L5 disc herniation/right-sided radicular pain and the need for surgery are not causally related to the 2/29/2008 accident, he denies the second period of TTD benefits, outstanding medical bills and prospective medical care.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 8, 2013
Date

JUL 8 - 2013

ICArbDec19(b)

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

Ronald Wisniewski,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10 WC 35835
	) Consol. With	11 WC 17794
Estes Express Lines,	)	
	)	
Respondent.	)	

FINDINGS OF FACT:

PETITIONER'S TESTIMONY:

It is stipulated between the parties that the petitioner incurred an accident while working for the Respondent on February 29, 2008. At the time of the February 29, 2008 accident, the petitioner was 59 years of age, married and had no dependent children under the age of 18. He is currently 64 years of age. The petitioner worked for the Respondent as a line haul driver (truck driver) hauling one or two trailers over the road. He worked for the Respondent in this capacity since July 10, 2000. Before that he worked for other companies as a truck driver. He has been a truck driver for 40 years. Before driving a truck he worked as a laborer in a steel plant, a laborer for bricklayers and as a furniture mover.

On February 29, 2008, after going into the dispatch office and turning in his bills from the freight he brought back, the petitioner walked out the door and fell down the stairs. The petitioner testified: "And I took one step out the door and that was it, feet in the air and down the stairs I went." The petitioner testified that the stairs were soaked with water.

The petitioner did not lose consciousness, but was pretty shaken up. He was seen that day at LaGrange Memorial Hospital where he was referred to his family doctor. He was seen at Willowbrook Medical Center on March 5, 2008 by Dr. Bilotta, a company doctor. There was a diagnosis of a left gluteal and upper back contusion. He then came under the care of Dr. Zindrick on March 18, 2008, after being referred by his family physician, Dr. Christopher Brenner. Dr. Zindrick performed an evacuation surgery to his left buttocks. On April 28, 2008, Dr. Zindrick released him to return to work as of May 5, 2008, and he did return to his normal work duties on that date. He noticed that that his back "wasn't right" as he performed his job and returned to see Dr. Zindrick on May 30, 2008. At that time, Dr. Zindrick recommended physical therapy and a follow-up appointment in one month. However, the petitioner did not undergo such physical therapy and did not return to Dr. Zindrick one month later.

The petitioner was paid TTD during the time he lost from work from March 1, 2008 through May 4, 2008. All of his medical bills for treatment rendered during that period were also paid by the respondent.

After May 30, 2008, the petitioner testified, the next time he saw a doctor for his back was more than 27 months later when he returned to see Dr. Zindrick on September 10, 2008. Dr. Zindrick took him off work. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job. He had had a nice run and made good money. He didn't have to deal with people, which was why he drove trucks in the first place.

During that 27 month period he also saw his family doctor, Christopher Brenner, "[m]aybe once every 2, 3 months."

The petitioner testified that during the intervening time, his back had gotten progressively worse until he couldn't take it anymore. He testified that the pain went down his right leg and his feet were numb. He did not sustain any new accidental injuries between May 30, 2008 and September 10, 2010.

During that 27 month period of time, the petitioner performed, for the most part, his regular work duties. The petitioner testified that at some point in time when his back was sore, he had spotters hook up and unhook the trailers for him so that he would not have to deal with the dollies. He testified that the dispatcher, Ish Thomas, "more or less took care of me."

When the petitioner worked during that intervening period (5/5/2008 - 9/9/2010) he leaned on one side and used the armrest more. He also leaned back to maneuver around while driving to get relief from the pain.

The petitioner testified that he normally works a 10-hour day and would normally drive 628 miles a day. The petitioner testified that the video of the job analysis (R's Ex 5) does not show all of the tasks that he is required to do. In addition to driving, he would also hook up trailers to be hauled. If two trailers were used, a dolly in the middle of the two trailers was required. Such dolly weighed over 3,000 pounds. He would hook the trailer to the dolly (P's Ex 12). As part of the procedure of hooking up the trailers, he would crank up the dolly legs on each trailer. This was fine in summertime but in wintertime "all that stuff froze up; so it was really hard to crank that stuff up and down." Sometimes it was necessary to crawl underneath the trailers to get to the dolly legs and to crank the dolly legs down so that the fifth wheel wouldn't miss the pin on the trailer and then go past the pin.

The petitioner also testified that once the trailer was retrieved, it was dropped on an open spot in the yard. He would then have to retrieve the dolly, pick up the dolly, put it on the back of a pintle hook and drag the dolly back to the trailer. He would then have to find the second trailer.

This required him to pick up the dolly once again and to put it on the pintle hook that is on the back of the first trailer. He positioned the trailers such that the lighter trailer was in the back and the heavier trailer was in the front. Then he would get the dolly, put it on the back of a pintle hook, lock it and drag it over to the trailer that had been dropped. He would back the tractor in front of the trailer and drop the dolly. He would lift the dolly off the hook and push it back a little in front of the other trailer and then go and find the heavier trailer. Then he would hook up that trailer. Once the trailers were hooked up, he would hook up all the hoses and the light cord, two safety chains and roll up the dolly legs on the back trailer, check the tires, check the air hoses and check all the lights. He would get under the first trailer to make sure the lock on the fifth wheel was locked. He also had to open the hood, inspect the engine and close the hood. Finally, he'd get in the truck, straighten out his logbook and write up whatever was required before leaving. These activities took up 5 - 10% of his day versus driving. (1/2 hour to 1 hour vs. 10-11 hour work days)

The petitioner testified that his back pain started right after the February 29, 2008 accidental injury and that the right leg pain came later on.

After September 10, 2010, he applied for and received short-term disability benefits and then he received long-term disability benefits. He has remained off work since September 10, 2010. Dr. Zindrick prescribed back surgery and he wants to have it performed.

The petitioner has had prior workers compensation claims filed with the Illinois Workers' Compensation Commission: case # 95 WC 22261, for injuries to his bilateral shoulders for which he received 45% loss of use of the left arm and 40% loss of use of the right arm; case #08 WC 04932 against Estes Express, when a sustained a hernia, for which he received 2% loss of use, man as a whole; and case #86 WC 25799 against JAM Trucking, which proceeded to arbitration, and was awarded 10% loss of use of a left arm and 10% loss of use of a left leg.

The petitioner admitted to being in a motor vehicle accident on January 14, 2011 on his way to Dr. Zindrick's office when he was rear ended by another vehicle. The other driver ripped her bumper off and his car was not damaged. On redirect examination, the petitioner testified that Dr. Zindrick's statement in the record that the petitioner sustained "No increased low back pain" after such motor vehicle accident was a fair statement.

TREATING RECORDS:

On February 29, 2008, the petitioner was first seen at LaGrange Memorial Hospital ER (P's Ex. 1) where the following history is recorded: "Patient slipped on steps at work and fell on his left buttocks and left arm. Pain to buttocks and back." He was advised to apply ice 20 minutes every hour for 2 days, get plenty of rest and to follow up with Dr. Brenner, his Primary Care Physician, in 2 - 3 days. He was prescribed Skelaxin, a muscle relaxant medication and Vicodin, a narcotic pain reliever. Both the cervical and lumbar areas of his spine were x-rayed. There was an impression of degenerative disc disease of the cervical spine and C7/T1 could not been seen. Also, the lumbar spine had six lumbar type vertebral bodies. There was a grade I retrolisthesis of L4 on L5. The alignment was otherwise normal. The vertebral body height and disc space height

was well maintained throughout. Anterior osteophytes were seen at all levels. Calcifications are seen over the course of the abdominal aorta. There was an Impression of degenerative disc disease of the lumbar spine without evidence of acute fracture.

On March 3, 2008, the petitioner presented at Willowbrook Medical Center (P's Ex #2) where he gave a history of slipping and falling down wooden stairs, and in the process, falling heavily on his low back and buttocks. The straight leg raising was 80 degrees bilaterally with only mild buttock discomfort on the left at the end range. The Lasegue maneuver was negative bilaterally. He also complained of upper thoracic pain. He was placed off work through March 5, 2008 as he was diagnosed with a left gluteal/upper back contusion. He had a large swelling over his left buttock.

On March 5, 2008, the petitioner followed up at Willowbrook Medical Center wherein he would continue to remain off work through March 10, 2008 due to his left gluteal/upper back contusion.

On March 10, 2008, the petitioner presented for follow up at Willowbrook Medical Center wherein he was prescribed a course of physical therapy three times a week for one week.

On March 12, 2008, the petitioner presented for follow up at Willowbrook Medical Center having undergone therapy that day. There was a resolving ecchymosis and the diagnosis remained a thoracic and buttock contusion.

On March 17, 2008, the petitioner followed up with Dr. Bilotta at Willowbrook Medical Center. At that time, he continued to have buttock and left lower extremity pain. The medical note also indicates significant tenderness to the left upper buttock. Exam revealed tenderness of the right buttock. The sensory, motor, and reflex examinations of the lower extremities were intact. The medical note also indicates: "There is a possibility that patient has some pressure on his sciatic nerve due to the hematoma that could be causing some of the radiated pain." The petitioner was instructed to continue physical therapy. The petitioner was kept off of work.

On March 18, 2008, the petitioner presented for initial examination with Dr. Michael Zindrick at Hinsdale Orthopedics (P's Ex 3). He indicated he fell down six stairs on February 29, 2008 while at work and sustained a contusion to the left buttocks and leg. He was in the process of leaving work to go home when the accident took place. The examination revealed severe ecchymosis and hematoma into his left buttocks and extending down the posterior thigh and up into the lumbar area and total gluteal area on the left side. He had a softball-sized lump in his left gluteus. The petitioner had a "mildly positive straight leg raise for causing discomfort into his buttock area." X-rays taken at LaGrange Memorial Hospital of his lumbar spine showed some degenerative changes. As such, he was diagnosed with partially resolved large gluteal hematoma on the left side. An MRI was ordered in order to evaluate the full extent of this issue.

On March 20, 2008, the petitioner presented for an MRI of the pelvis wherein the findings were notable for a large soft tissue hematoma overlying the left buttocks, and there was a moderate soft tissue edema towards the left. The findings were also suspicious for an undescended testicle.

On March 24, 2008, the petitioner presented for a follow-up appointment at Willowbrook Medical Center. The examination revealed a persistent hematoma on the left buttock, which was approximately the size of 1 - 2 golf balls. That same day, the petitioner followed up with Dr. Zindrick wherein it was decided the petitioner would undergo a left gluteal evacuation for the hematoma.

On March 26, 2008, the petitioner presented at Adventist Hinsdale Hospital (P's Ex. #5) where he underwent an evacuation of his left buttock hematoma. Dr. Zindrick wrote: "He was originally ecchymotic from his lumbar spine to his foot and across both buttocks." The post-operative diagnosis: "Deep post- traumatic hematoma of the left gluteus and buttock."

On April 7, 2008, the petitioner followed up with Dr. Zindrick, status post evacuation of the hematoma and indicated less pain. The wound was clean and dry, and the petitioner was able to walk without assistance. He would remain off work as he should not be moving around in his truck.

On April 28, 2008, the petitioner followed up with Dr. Zindrick at which time he noted some mild discomfort and fluid collection in the area. It was noted the ecchymosis was resolved. The wound was well healed, and he was able to return to work as of May 5, 2008.

On May 30, 2008, the petitioner presented for follow up with Dr. Zindrick. His Progress Notes that day state:

PRESENT HISTORY: The patient has had some increasing pain since he has been back to work into his low back and tailbone area. His gluteal area still is tingling and numb.

PHYSICAL EXAMINATION: The patient can toe-walk and heel-walk. He has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. He is tender over his gluteal region.

X-RAY FINDINGS: X-rays of his back show some minor degenerative changes. No other gross abnormalities are seen.

IMPRESSION: Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with hematoma and resolution of the contusion to his gluteus and buttock area.

RECOMMENDATIONS: Off work until Monday. Physical therapy, core stabilization, low back exercises, body biomechanics, and modalities as needed. Relafen 750 mg b.i.d. He was cautioned about GI upset. Return in a month.

On September 10, 2010, approximately 2 years and 3 months later, the petitioner followed up with Dr. Zindrick. He had complaints of increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." His symptoms were worse with sitting too

long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related in the course of time that he had his gluteal injury, it changed his posture while sitting and this was associated with increased back pain. He also associated significant lifting with the unhooking and loading of trucks coupled with driving extended distances as a means of making his back pain progressively worse. X-rays of his back show significant degenerative changes in his lumbar spine. As such, he was diagnosed with back pain with radiculopathy. Recommendations included an MRI of the lumbar spine and a trial of a Medrol Dosepak followed by Relafen with Norco for pain. He would remain off work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

On September 16, 2010, the petitioner presented for an MRI (P's Ex. #10) of the lumbar spine wherein the findings were notable for a reversal of a normal cervical lordosis with diffuse spondylotic changes, a right paracentral disk herniation at L4-5 with mild to moderate stenosis greater on the right, a left paracentral disc protrusion at L5-S1, and mild canal and neural foraminal stenosis at L1-2, L2-3, and L3-4.

On September 20, 2010, the petitioner had a telephone conversation with Dr. Zindrick's physician's assistant regarding his MRI results and the petitioner indicated that his medication was not helping to alleviate his pain. As such, he was prescribed with Naproxen and Norco.

On September 28, 2010, the petitioner requested a refill of Norco.

On October 1, 2010, the petitioner followed up with Dr. Zindrick, at which time he indicated he was having 40% back and 60% buttock and leg pain. Based on the MRI, the petitioner had a disk herniation at L4-5 on the right, which was consistent with his symptoms. As such, he was diagnosed with a right L4-5 disk herniation with low back pain and radiculopathy. Overall, the petitioner had multiple level degenerative disk disease, but his symptoms fit clearly with his disk herniation at L4-5 on the right. A trial of epidural steroid injections and a course of physical therapy were recommended. If he did not improve, surgical intervention was an option.

On October 14, 2010 and October 28, 2010, he was given transforaminal lumbar epidural steroid injections under fluoroscopic guidance by Dr. Bardfield.

On November 1, 2010, the petitioner presented for follow up with Dr. Zindrick wherein he would remain off work and recommendations included a repeat MRI of the lumbar spine.

On November 16, 2010, the petitioner returned to Dr. Zindrick when his back pain persisted. An EMG/NCV was prescribed and he was advised to remain off work.

On November 22, 2010, an EMG/NCV was performed and the findings were consistent with chronic polyradiculopathy L4 - S1, electrophysiologically with sensory motor polyneuropathy LLE.

On December 13, 2010, the petitioner returned to Dr. Zindrick. His back pain persisted and he continued to use medications and walked with a cane. A myelogram and post-myelogram CT

was prescribed at that time. He was to remain off work.

On January 3, 2011, a myelogram was performed. It revealed, at the L4 - L5 level, the following: "There is prominent posterior protrusion of disc material, greater towards the right. This causes bilateral foraminal stenosis, greater towards the right side . . . There is also mild bilateral bony foraminal stenosis present due to posterior osteophytes." At L5 - S1 level: "There is midline posterior osteophyte/disc complex without spinal stenosis. No significant foraminal stenosis is identified.

On January 14, 2011, the petitioner was seen by Dr. Zindrick and had been involved in a motor vehicle accident on the way to Dr. Zindrick's office. He had neck pain and right shoulder pain. X-rays of his cervical spine were taken which revealed multiple level degenerative disc disease and no acute fracture or injury seen. He had a painful range of motion of his neck with 50% restriction of motion with flexion, extension and rotation.

On February 25, 2011, the petitioner saw Dr. Zindrick and he concluded the petitioner had failed conservative care and he opined that surgery would be of benefit. He proposed to limit the surgery to L4 - L5 with the goal of trying to do a laminectomy and discectomy since his prognosis was guarded due to his multiple level degenerative disc disease. Dr. Zindrick noted that if the segment was found to be unstable, it can be fused at that time and but that he would try to avoid this.

On March 24, 2011, he saw Dr. Zindrick again at which time he was continued on medications and advised not to work. Dr. Zindrick continued his prescription for the L4 - L5 lumbar laminectomy and discectomy surgery.

When the petitioner was seen by Dr. Zindrick on May 3, 2011, June 17, 2011, August 9, 2011, September 30, 2011, December 2, 2011, January 20, 2012, March 16, 2012, April 13, 2012, July 13, 2012 May 25, 2012, and August 24, 2012, his diagnosis and prescription for surgery remained unchanged.

Although the petitioner testified that he saw his family doctor "[m]aybe once every 2, 3 months" during the period of June 2, 2008 until September 10, 2010, he did not offer Dr. Christopher Brenner's records into evidence.

DR. ZINDRICK'S TESTIMONY ON MARCH 14, 2011 (Petitioner's Exhibit #6)

Dr. Zindrick is Board Certified in Orthopaedic Surgery and in Spinal Surgery. He has numerous publications and presentations. He has authored chapters in scholarly medical texts and has served as a faculty member for numerous courses.

Dr. Zindrick testified that the petitioner had completed a Patient Assessment when he first saw him on 3/18/08. On the Patient Assessment, the petitioner indicated that his pain was located in his lower back, buttocks and left leg.

Dr. Zindrick testified regarding the history the petitioner provided to him and the findings, which are contained in his several records. Those findings are outlined in detail above with the summary of his treating records.

Regarding petitioner's back complaints and symptoms, Dr. Zindrick noted that when he first examined the petitioner on 3/18/08 he had a positive SLR test on the left. His primary attention was to the large hematoma on the left thigh, which required surgical evacuation. The petitioner returned to the full duties of a truck driver on 5/5/08. The petitioner returned to Dr. Zindrick on 5/30/08 at which time he complained of increasing pain in his low back and tailbone and tingling into his gluteal area after he returned to work.

The petitioner did not return to see him until 9/10/10, which was over two years later. At that time the petitioner gave a history of his back pain worsening within six months of his original injury and of pain radiating down his right leg. He noted that since his return to work, he changed his posture sitting more on his right side and noted an increase in pain when driving extended distances and lifting while unhooking and loading trucks.

In addition to the records through 11/12/10, Dr. Zindrick noted that another MRI was performed on 11/11/10 and the findings were essentially unchanged from the MRI performed on 9/16/10. The MRI's showed that petitioner had a herniated disc on the right at L4-5 as his primary pain generator, as well as pathology at L5-S1, a protrusion on the left side, and degenerative findings at all levels.

On 11/22/10, an EMG/NCV was performed which corroborated chronic polyradiculopathy at L4-S1. This confirmed his diagnosis of a herniated disc at L4-5.

He saw the petitioner again on 12/13/10 and 1/14/11. On 1/14/11, petitioner was treated for a cervical problem as he was rear ended while driving to his office on that date. There has been no further treatment for his cervical complaints.

On 1/3/11, a lumbar myelogram was performed which confirmed a prominent posterior protrusion of disc material on the right at L4-5. A herniated disc was not confirmed at L5-S1 on the left although there were findings of posterior osteophyte/disc complex without spinal stenosis.

On 2/5/11, Dr. Zindrick felt that the petitioner had failed conservative management (he underwent two ESI's which had increased his pain bilaterally) and recommended that the petitioner undergo surgery at L4-5 for a laminectomy and discectomy although kept open the option of performing a fusion depending on what he found when he performed the surgery.

It was Dr. Zindrick's opinion that the current condition of the petitioner's back is causally related to the 2/29/08 slip-and-fall down stairs, and was also aggravated by the petitioner's work activities following his return to work after being discharged from care on 5/30/08. He noted that the petitioner had back complaints from the time he saw him on 3/18/08, although they were left-sided. Also, according to the petitioner's history on 9/10/10, his back symptoms became

progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right while sitting, while doing extensive driving and while lifting while unhooking and hooking his truck. It was his opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at this time and had been unable to do so since he saw him on 9/10/10.

Finally, he noted that Hinsdale Orthopaedics had an outstanding bill for $19,992.00 for services rendered to the petitioner for treatment, which was causally related to the 2/29/08 accident.

During cross-examination, Dr. Zindrick admitted that when he first saw the petitioner, he did not review the records from Willowbrook Medical Center for 3/3/08 and 3/5/08, which indicated a diagnosis of left gluteal and upper back contusion. When he saw the petitioner on 3/18/08, he was unaware of any upper back contusion as most of the complaints pertained to the left thigh hematoma and the back.

He also admitted that when he performed the SLR test on 3/18/08, it was mildly positive on the left. There were no right-sided complaints until he saw the petitioner over two years later on 9/10/10.

He also admitted that MR images of the petitioner's lumbar spine were not originally taken; only MR images of the pelvis were originally taken in order to evaluate the hematoma.

Dr. Zindrick testified that September 10, 2010 was the first time the petitioner saw him and complained about the right side. At that time he noted petitioner's history of worsening low back pain within six months of his injury. Dr. Zindrick dated the onset of right leg complaints at six months post accident. However, he opined that the back complaints were aggravated by the petitioner's work activities following his return to work as a truck driver.

He opined that the petitioner's main problem is with a herniated disc at L4-5 on the right. This is different than his symptoms when he treated the petitioner in 2008 although he felt the petitioner did have discogenic back pain aggravated by return to work on 5/30/08.

He noted that a myelogram was performed 1/3/11, which confirmed his diagnosis of a right sided herniated disc at L4-5 but not at L5-S1 which had noted a protrusion on the left on the earlier MRI's.

He admitted that he did treat patients who have underlying degenerative disc disease who progress to the point where surgery is necessary without having suffered trauma. He noted that petitioner had a slip-and-fall down stairs, which started petitioner's low back symptoms. These problems were noted during his treatment in 2008. The problem then became aggravated with the petitioner's return to work. Prior to his accident, the petitioner had no complaints, only afterwards. The complaints worsened after he returned to work. Accordingly, his problem was related to the 2/29/08 accident and in part due to aggravating the condition further with his work

activities.

TESTIMONY OF DR. ZINDRICK AUGUST 13, 2012 (P's Ex. #7)

Dr. Zindrick testified for the second time on August 13, 2012. Dr. Zindrick previously testified on March 14, 2011 and indicated that the petitioner's lumbar spine condition was causally related to either the specific work accident on February 29, 2008 or from repetitive trauma following the petitioner's return to work in May of 2008.

Dr. Zindrick did not review the job video during the deposition, but did so prior to beginning his testimony. Dr. Zindrick testified that the video did not change any of the opinions contained in his prior testimony. He commented that the job video reinforced his prior opinion that the petitioner's current condition is causally related to the February 29, 2008 work accident. Furthermore, it was his opinions that the petitioner was a candidate for surgery and is presently unable to work are unchanged. He has been monitoring the petitioner's condition and it remains unchanged.

On cross-examination, Dr. Zindrick testified that the petitioner's condition is causally related to the initial work accident. In his prior testimony, he indicated that it could also be from repetitive trauma. Dr. Zindrick admitted that the petitioner's job duties, as depicted in the job analysis video, were not "repetitive."

On re-direct examination, Dr. Zindrick suggested that the activity that contributed to the petitioner's current condition of ill-being was driving 5-1/2 hours each way with underlying degenerative disc disease and while altering his sitting position. He testified that the petitioner's left buttock hematoma caused him to sit in an unusual fashion and was the cause of his current complaints.

In terms of exhibits entered into evidence, the petitioner presented the written job description from Genex. He also presented a copy of spec. sheet from Hyundai for a "HT Dolly." Opposing counsel claims that this is the dolly used by the petitioner. The sheet contains facts and figures regarding the dimensions and weight of the dolly.

TESTIMONY OF DR. BABAK LAMI ON MARCH 17, 2011 (Respondent's Exhibit #3)

Dr. Lami testified to his credentials as reported on his Curriculum Vitae, a copy of which is attached as a (deposition exhibit Respondents Ex. No. 1). Dr. Lami is Board Certified as an Orthopaedic Surgeon with an interest in pediatric and adult spinal surgery. He is a member of the North American Spine Society. He confines his practice entirely to treatment of the spine. He noted that he and his partner perform over 200 surgeries annually. He devotes over 90% of his time to care of patients. He further testified that he also conducts independent medical exams that are "pretty much 100 percent for - - at the request of the employers." Dr. Lami testified that in 2010, he conducted fewer than 200 independent medical examinations.

He testified to the history, findings and review of treating records as contained in his narrative

report (Respondent's Deposition Ex. No. 2) and as recited in the summary of treatment with Dr. Zindrick above. In addition, he reviewed the additional records from Dr. Zindrick, which he had not previously reviewed including the important second MRI and myelogram.

It was Dr. Lami's opinion that although the petitioner has a right-sided disc herniation at L4-5 and has restrictions, which would prevent him from working as a truck driver, this condition is not causally related to the 2/29/08 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left thigh for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick was a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While an MRI of the pelvis was taken shortly after the accident, an MRI of the lumbar spine was taken until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/5/08 - 9/10/10, at which time he saw Dr. Zindrick for right-sided back complaints including radiculopathy.

Dr. Lami opined that such right-sided complaints were completely unrelated to the original injury, which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of the petitioner's underlying degenerative disc disease.

Accordingly, Dr. Lami opined, this new problem was related to the petitioner's personal medical condition to his work. As far as any work activities aggravating his back, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so at this time, he would experience too much pain to be able to perform his work duties. He concluded that the petitioner's current back condition was unrelated to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010 based upon the following factors: 1) There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2) Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3) The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms, i.e., radiculopathy, immediately or shortly after that; and 4) Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick would have missed them.

On cross-examination, the following exchanges took place:

Q: Well, isn't there a medical note from September 2010 that indicates by history the patient reported experiencing pain down into his right leg within six months of the accident in February 2008?

A: There are no - - if he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg.

He has radicular symptoms due to a personal health issue and he waits until 2010 to see the doctor.

This is not consistent with a traumatic injury. More of progressive over time. In fact, the gentleman waits until 2010 to see the doctor. This is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset.

Q: But there is a medical note that indicates that he reported radicular-type symptoms going down the right leg within six months of the accident.

A: There is a note in 2010 that says what you just stated. (R's Ex. #3, Dep. PP. 30-31).

Dr. Lami did not dispute that the petitioner reported lower back pain to Dr. Zindrick on March 18, 2008. Dr. Lami opined that the February 29, 2008 accident did not aggravate or accelerate the petitioner's pre-existing degenerative disc disease. However, Dr. Lami conceded that someone falling down the stairs could cause a traumatic disc herniation. With respect to his work status, Dr. Lami recommended that the petitioner be placed on sedentary-type work with no bending or lifting more than 10lbs.

TESTIMONY OF DR. BABAK LAMI, M.D. DECEMBER 9, 2011 (Respondent's Exhibit #4)

Direct Examination

Dr. Lami testified that he had previously testified on March 17, 2011, at which time his CV was entered into evidence. At the time of this deposition, that CV was still up to date, he was still in the same practice, and in the same line of work. Dr. Lami recalled that at the time of his previous testimony, the petitioner had a condition of hematoma and some low back condition. Dr. Lami did not have any dispute as to the petitioner having right-sided radiculopathy in 2010. Dr. Lami reported that at the time of his previous deposition, he received a written job description and a video description.

Dr. Lami stated that his opinion was within a reasonable degree of medical and surgical certainty, and that throughout the deposition he would give all of his opinions within that standard.

Dr. Lami's medical report was entered into evidence at that time.

Dr. Zindrick also opined that the back pain could be coming from repetitive bouncing, doing repetitive bending, twisting, unhooking, and unloading the trucks. Dr. Lami reported that he did not agree with Dr. Zindrick's position. Dr. Lami found it interesting that Dr. Zindrick opined the petitioner had an acute injury, but in case it was not acute, he opined it would be repetitive.

Dr. Lami described asymptomatic disc herniations as somebody who does not have nerve pain going down his leg. So the disc herniation pushes on the nerve, which can cause pain going to the leg. That, he stated, would be symptomatic disc herniation. He also stated that an asymptomatic herniation could become symptomatic from different traumas including sneezing or twisting. However, it was possible that no particular trauma existed at all. If the symptoms came from a traumatic event, Dr. Lami opined, it would be reasonable for the symptoms to appear within days of the trauma. However, it would be unreasonable to say that the symptoms arrived within six months or a year down the line. From Dr. Lami's examination of the MRI report, it was his opinion that the problems the petitioner was having were degenerative rather than traumatic. However he did not personally review the MRI, so he was only able to give his opinion based on the review of the MRI report. He was only able to see the description by the radiologist. Based on that description, Dr. Lami opined it appeared to be a degenerative protrusion.

Written Job Analysis

Dr. Lami was given a copy of a written job analysis from Genex. He described the job summary as the driver taking a load from the origin site and delivering it to the destination, which was listed as St. Louis, switching the trailers with another driver, and bringing a new trailer back to the original location. The job usually lasted eleven hours per day, depending on traffic, five days a week. Based on that job description, Dr. Lami opined that there was nothing repetitive in nature that would cause the petitioner's symptoms. Rather, the petitioner was sitting in a cab, driving the truck. This was not, in Dr. Lami's opinion and most medical doctors' opinion, a repetitive action.

Dr. Zindrick described the petitioner's job as repetitive lifting, bending, twisting, unhooking and loading of trucks, and bouncing around in the cab of a truck in an altered sitting position. It was Dr. Zindrick's opinion that all those things could contribute to aggravation or worsening of the petitioner's back condition. Dr. Lami disagreed with that opinion. He believed that a factory line worker, who would be loading/unloading thirty times per minute, would have a repetitive motion. However, the petitioner was not engaging in any repetitive action here. He was driving most of the day, and was hooking and unhooking twice a day. In terms of discomfort from gluteal hematoma, Dr. Lami believed that was an unfounded opinion. Hematomas are very common and resolved, and the petitioner was asymptomatic. Because a hematoma is just a bleeding underneath the skin, which absorbs and goes away, there should not be any altered sitting position or discomfort from a hematoma. Further, the petitioner's hematoma had resolved by the time he was initially released from care in May of 2008.

Video Job Analysis

Dr. Lami had an opportunity to review the video job analysis. While watching the video, Dr. Lami noted that the driver backs up the truck and connects the electric cables to the trailer from the truck. This occurs at each changing, which would be twice a day. The driver uses the crank to lower the trailer, and he rotates his arm in cranking. Next, the driver opens the hood to inspect the engine and closes the hood. Then, the driver uses the crank in the reverse direction, the legs

are lowered to the ground and he is standing slightly bent, in this case he uses both arms while the cables are disconnected. Once the cables are tucked away, the driver drives the truck away, disconnecting the trailer. During all of these actions the driver was mostly standing. Dr. Lami noted that the driver did, at one point, flex his lower back to thirty, forty degrees to lift it up, but again, he was mostly standing. Once the driver arrives at his destination, he connects the trailers and reconnects the cables. At that time, he goes under the trailer, inspects the lower part, and uses the crank again. Dr. Lami noted that even though the petitioner had to engage in a cranking motion twice a day, there was nothing about that task that could have aggravated a preexisting back condition.

Regarding Dr. Zindrick's Report

Dr. Lami was asked about Dr. Michael Zindrick causation opinions. On direct examination, the following exchange took place:

Q: Doctor, I want to show you page 54 of the deposition from Dr. Zindrick that you previously reviewed. Would you please look at the answer portion of that page and read that into the record?

A: Dr. Zindrick said, "Well, the symptoms can change, and clearly he did not have right leg radiculopathy when he first saw me. He did have back pain. He had ongoing back pain that ultimately evolved into right leg discomfort or right leg pain and discomfort with a right-legged disc herniation. Now, traumas can result in weakening of the disc fibers, the annulus, and over time it can evolve into a full-blown disc herniation."

"So, between, as I mentioned earlier, the combination of the fall resulting in an ongoing chronic bachache, then this gentleman returns to his job of vibratory exposure, sitting abnormally, repetitive bending, twisting, lifting, loading and unloading trucks, hooking and unhooking trailers."

"A combination of those factors could very easily, and very consistent with medical knowledge of how disc herniations occur, result in the progressive disc herniation six months down the line and the onset of leg symptoms; and as time goes on, it's gotten worse."

Q: Now doctor, we've just discussed that you reviewed the written Job Analysis and the video Job Analysis for the Petitioner's job. Taking those into consideration, do you agree or disagree with Dr. Zindrick's opinion?

A: I don't agree, and I don't see how he can give this opinion based on reasonable medical and surgical certainty.

Q: Could you explain why you don't agree with that?

A: Because having degenerative changes in the general population is very common, and the degenerative changes can weaken the fibers of the disc. In addition, his previous MRI after his

injury showed diffuse spondylitic changes. Although there was a right-sided disc herniation at L4-L5, there was also left-sided (sic) disc herniation at L5-S1.

How can you tell me, based on a reasonable degree of medical certainty, that the fibers were weakened by a particular event, which didn't result in radiculopathy, not caused by degenerative changes, which are more consistent with natural history and the way he presented to providers?

So, the fact that the patient had no symptoms coming from the disc, no one can say, based on a reasonable degree of medical certainty, that anything was from that disc months or a year later. (R's Ex 4, pp. 19-21)

In conclusion, Dr. Lami opined that the petitioner's low back condition was not related to any injury or activities of employment, and that it was due to his personal health and degenerative changes.

Cross-Examination

Dr. Lami reported that the only examination he had of the petitioner was on November 12, 2010. His October 12, 2011 addendum was solely based on some additional medical records that he reviewed regarding the petitioner, the written job analysis with which he was provided, the videotape job analysis, and his review of Dr. Zindrick's deposition transcript.

Dr. Lami noted that during his original deposition, he did not disagree with Dr. Zindrick's diagnosis or his treatment options. Dr. Lami noted that at the time he saw the petitioner, he only knew that the petitioner was a truck driver. He was not aware at that time that the petitioner had to engage in hooking or unhooking of the truck as a part of his job description. Dr. Lami did not learn of these requirements until he saw the video following his evaluation of the petitioner.

Dr. Lami was asked to review the video job analysis once again. This time, his testimony was focused on the driver's cranking. Dr. Lami indicated that he did not know how much force was needed to operate the crank, since the video did not show any numbers. Therefore, the amount of force needed to move the crank could vary based on certain conditions including different weather conditions, the weight of the specific load or the different positions of the trailer. Even so, from the video, Dr. Lami opined that the force appeared to be not very significant either with one hand or two. He believed it was within the petitioner's capability. Dr. Lami reported that in terms of the other activities the driver was performing in the video, it was difficult to know how much force was being used since the video does not indicate any weight measurements. However, he agreed that the driver in the video appeared to be using some resistance, and force. Dr. Lami was hesitant to say that it was "possible" for the repetitive cranking the petitioner had to do had a cumulative effect on his back condition.

Dr. Lami agreed that the driver in the video had to move a three thousand pound dolly by lifting the front end of the dolly in order to connect it to the trailer, and then lifting it again to disconnect it. While doing this, the driver used both hands and arms and was bent over. When asked whether it was possible that the petitioner's lumbar condition resulted from the repetitive

action of working with the dolly over a period of two and a half years, having to maneuver, lift, push, pull, and place that dolly at least one hundred times, Dr. Lami opined that while anything was possible, he did not believe that lifting one hundred times in the period between May, 2008 and September, 2010 could cause the petitioner's back issues. Dr. Lami agreed that it was possible that his personal definition of repetitive activity was different from that of Dr. Zindrick's as well as any other doctor. However, he emphasized that he was giving his opinion based on a reasonable degree of medical and surgical certainty.

Dr. Lami was asked to review the job analysis. He noted that under the heading "pre-trip inspection", a driver was instructed to pull the hood forward to open by using his legs as leverage. He was to place his foot on a bumper of the truck and pull the hook back. He was to check the levels of fluid and push the hood shut when finished. In order to shut the hood, the driver was to use his leg and arms as leverage to prevent the hood from slamming thus. Under the "arriving to origin location" heading, a driver was advised that he may need to pick up the dolly in order to physically connect the dolly to the trailer. In order to do this, the driver was to use two hands, physically move the dolly (the dolly is on wheels) to the trailer, and connect the wires. Based on that description, Dr. Lami agreed that part of the petitioner's job was to physically move and connect the three thousand pound dolly.

Dr. Lami also opined that the hematoma that the petitioner had sustained on February 29, 2008 had resolved by the time Dr. Zindrick last saw him on May 30, 2008 (Yet, the May 30, 2008 Progress Note indicates that the petitioner experienced tenderness, tingling and numbness over the left gluteal region on that date).

Re-Direct Examination

Dr. Lami reported that as of the present date, December 9, 2011, he did not have any information or reason to dispute Dr. Zindrick's treatment of the petitioner. Further, he did not have any reason or basis to dispute his diagnosis of the petitioner's condition. However, Dr. Lami did not agree with Dr. Zindrick's opinion as to the cause of the petitioner's low back condition.

Dr. Lami was asked to review the "crank section" of the physical demand/ tools and equipment section of the job analysis. Based on his review, he stated that it took approximately three to fourteen pounds of force in order to move the crank. That three-to-fourteen pound range accounted for the variables that Mr. Januszkiewicz spoke about during his cross-examination. Further, Dr. Lami noted that the hood weighed about twenty-four pounds as described in the job description. Finally, Dr. Lami noted that although the dolly itself weighed three thousand pounds, Dr. Lami had never met anybody who could lift three thousand pounds, and he had never given anybody a three thousand pound lifting restriction when they went back to work. In other words, he reported that while the dolly itself weighed three thousand pounds, the driver is not actually lifting three thousand pounds. The dolly is on wheels.

Dr. Lami reported that he is a diplomat of the American Board of Orthopaedic Surgeons, and that he keeps up with his research and literature related to his practice.

Re-Cross Examination by Mr. Januszkiewicz

During re-cross examination, the following exchange took place:

Q: Doctor, again, it sounds like you're saying it's impossible that the repetitive activities in Mr. Wisniewski's case would have aggravated or exacerbated or accelerated his preexisting condition; correct?

A: Very close to it, yes.

Q: It's impossible from a medical standpoint, based on the question just asked you by counsel?

A: Correct. (P's Ex 4, pp. 55-56)

Dr. Lami agreed that the petitioner did not have to pick up the dolly itself and merely engaged in pushing and pulling the dolly that was on wheels.

CONCLUSIONS OF LAW:

F. IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that the left gluteal hematoma, contusions and back pain are causally related to the February 29, 2008, slip-and-fall accident.

However, the Arbitrator finds that the petitioner's L4-L5 disk herniation/right-sided radicular pain is not related to the February 29, 2008 accident.

On May 5, 2008, the petitioner returned to his regular-duty job of truck driver.

On May 30, 2008, Dr. Zindrick did not release the petitioner from his care and did not declare the petitioner to be at maximum medical improvement. However, since the petitioner did not seek treatment for his low back pain and his left gluteal hematoma from any doctor or medical professional, including Dr. Zindrick, until September 10, 2010, the Arbitrator concludes that Mr. Wisniewski was not in need of additional medical care for his accidental injuries.

The petitioner testified that at some point, Ish Thomas assigned a spotter to hook and unhook the trailers for the petitioner due to the petitioner's back pain.

The Arbitrator finds it significant that the petitioner did not treat for his low back with any doctor for a 27-month period of time. The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job.

Yet, the Arbitrator notes that the respondent paid the petitioner $6,924.32 in TTD benefits from March 8, 2008 through May 4, 2008.

Just prior to the gap in treatment, the petitioner saw Dr. Zindrick on May 30, 2008. Dr. Zindrick took a history that indicates the petitioner has had some increasing pain into his low back and tailbone area since he has returned to work, and that his gluteal area is still tingling and numb. X-rays of his back showed some minor degenerative changes. Upon conducting a physical examination, Dr. Zindrick found that the petitioner can toe-walk and heel-walk, but that he has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. Dr. Zindrick offered the following impression: "Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with a hematoma and resolution of the contusion to his gluteus and buttock area."

Although Dr. Zindrick's "impression" was diskogenic back pain, he did not conduct a straight leg raising test or order a lumbosacral MRI. Moreover, the petitioner was able to toe-walk and heel-walk.

On May 30, 2008, Dr. Zindrick kept the petitioner "[o]ff work until Monday", prescribed Relafen 750 mg. b.i.d., ordered physical therapy, core stabilization, low back exercises, body biomechanics and modalities as needed. Dr. Zindrick advised the petitioner to return to him in one month.

The petitioner did not undergo the recommended physical therapy and did not return to Dr. Zindrick 1 month later. He returned to Dr. Zindrick 27 months later, on September 10, 2010.

At the 9/10/10 appointment, the petitioner saw Dr. Zindrick for increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." He told Dr. Zindrick that his symptoms were worse with sitting too long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related that in the course of time that he had his gluteal injury, he had to change his sitting position. He put more weight on his right side, and this was associated with increased back pain. He also associated his progressively-worsening back pain with the significant lifting he performed when hooking and unhooking dollies, opening the truck hood and driving extended distances. X-rays of his back showed significant degenerative changes in his lumbar spine. Dr. Zindrick's offered the following impression: "Back pain with radiculopathy." Dr. Zindrick ordered an MRI of the lumbar spine and prescribed a trial of Medrol Dosepak followed by Relafen with Norco for pain. Dr. Zindrick opined that the petitioner was unable to return to work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

The petitioner testified that with the exception of seeing his family doctor, Dr. Christopher Brenner, "[m]aybe once every 2, 3 months" during this 27 month period, he did not see any other physicians for treatment between the June 2, 2008 and September 10, 2010. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

Dr. Zindrick is of the opinion that the petitioner's current back condition and need for surgery are causally related to the 2/29/2008 accident. The basis for Dr. Zindrick's opinion is that the petitioner had back complaints from when he saw him on 3/18/08, although they were left-sided. Also, according to petitioner's history on 9/10/10, his back symptoms became progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right side while sitting, as well as while doing extensive driving and lifting while unhooking and loading his truck. It was Dr. Zindrick's opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at that time and had been unable to do so since he saw him on 9/10/10.

Dr. Zindrick testified that traumas can result in weakening of disc fibers, the annulus, and over time it can evolve into full-blown disc herniation. (P's Ex 6, p. 54)

Dr. Zindrick admitted that when he first saw the petitioner on 3/18/2008, the SLR was only mildly positive at 80 degrees on the left, not the right where the herniation now exists at L4 - L5, where he proposed to perform a laminectomy and diskectomy and possible fusion. Further he admits that petitioner's symptoms are now right-sided where the main injury was to the left buttock on 2/29/2008. He also admits that petitioner was capable of performing his regular work duties for over two years before he sought additional care from him on 9/10/2010. He further admitted that when he saw the petitioner on that date, the petitioner described radicular symptoms, which had not developed for six months after his return to his regular work duties, but were not severe enough for him to seek any treatment until that date. He also admitted that he has treated patients who have underlying degenerative disc disease who progress to a point where surgery is necessary even though they have suffered no trauma.

In contrast to Dr. Zindrick's testimony is the testimony Dr. Babak Lami. It is Dr. Lami's opinion that petitioner's right-sided disc herniation at L4 -L5 is not causally related to the 2/29/2008 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left gluteus for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick is a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While a MRI was performed of the pelvis/gluteal region, an MRI of the lumbar spine was not performed until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/30/08 - 9/10/10 when he saw Dr. Zindrick again for right-sided back complaints including radiculopathy. Dr. Lami opined that these complaints were completely unrelated to the original injury which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of petitioner's underlying degenerative disc disease. Accordingly, this new problem related to petitioner's personal medical problem and was not related to his work.

In terms of aggravating his back by his work activities, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so, he would notice too much pain to be able to perform his work duties.

Dr. Lami concluded that the petitioner's current back condition was neither related to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010, based upon the following factors: 1. There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2. Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3. The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms immediately or shortly after that, radiculopathy; and 4. Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick, a spine surgeon, would have missed them.

Dr. Lami stated: "...[I]f he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg. He has radicular symptoms due to a personal health issue, and he waits until 2010 to see the doctor. This is not consistent with a traumatic injury, more of progressive over time. In fact, the gentleman waits until 2010 to go see a doctor. That is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset." (R's Ex. #3, Dep. P. 30).

The Arbitrator recognizes that on February 29, 2008, the petitioner's back and bottom struck the stairs so hard that he developed extensive bruising on his back and buttocks and a left gluteal hematoma the size of a softball. Initially, he exhibited mildly positive results for the left SLR test. The petitioner's therapist thought that the hematoma may be impinging on the sciatic nerve. The petitioner returned to full-duty work on May 5, 2008. On May 30, 2008, the petitioner did experience increasing pain in his low back and tailbone and tingling and numbness to his left gluteal area. Sometime thereafter, due to Mr. Wisniewski's back pain, Ish Thomas "lightened his load" at work.

However, there is no evidence that on February 29, 2008, the petitioner sustained an L4-L5 disc herniation with right-sided radicular pain.

The Arbitrator places great weight on the fact that other than the history he gave to Dr. Zindrick 2-1/4 years later and thereafter, the petitioner has not provided documentary evidence that his back pain began to worsen during the 6-month period after the accident, or that his radicular, right leg pain began at that time. The petitioner treated with Dr. Brenner every 2-3 months during 27-month period . . . and yet, he did not offer Dr. Brenner's records into evidence.

The Arbitrator draws the reasonable inference that Dr. Brenner's records do not support the petitioner's workers' compensation claim.

Furthermore, a review of the Adventist LaGrange Memorial Hospital reveals that although the petitioner treated for other conditions during this 27-month period, there is no mention of low back pain or radicular right leg pain in such records.

The Arbitrator notes that only one week after the petitioner reported to Dr. Zindrick that he experienced a "progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg", his attorney filed a claim.

Based on the foregoing, and by a mere preponderance of the evidence, the Arbitrator finds a causal relationship of the left gluteal hematoma, contusions and back pain to the accident of February 29, 2008, but no causal relationship between the petitioner's L4-L5 disc herniation/right-sided radicular pain to such accident. Consequently, the Arbitrator denies the second period of TTD, the medical bills and the prospective medical care.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Wisniewski,

Petitioner,

vs.

NO: 11 WC 17794

14IWCC0352

Estes Express Lines,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, medical expenses, prospective medical care and whether the L4-L5 disc herniation is causally related and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

The Commission affirms the Arbitrator's finding that Petitioner failed to prove he sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on September 10, 2010 and that Petitioner failed to prove a causal relationship exists. The Commission affirms the Arbitrator's denial of Petitioner's claim.

14IWCC0352

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2013 is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014
MB/maw
o03/06/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WIESNEWSKI, RONALD
Employee/Petitioner

Case# **11WC017794**
10WC035835

ESTES EXPRESS LINES
Employer/Respondent

14IWCC0352

On 7/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2337 WOODRUFF JOHNSON & PALERMO
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1109 GAROFALO SCHREIBER & HART ET AL
JOSEPH GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

14IWCC0352

___ Injured Workers' Benefit Fund (§4(d))
___ Rate Adjustment Fund (§8(g))
___ Second Injury Fund (§8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ron Wisniewski
Employee/Petitioner

Case # 11 WC 17794

v.

Consolidated Cases: 10 WC 35835

Estes Express
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Brian Cronin, Arbitrator of the Commission, in the city of Chicago, on November 2, 2012 and November 21, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. Was there an employee-employer relationship?

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. What was the date of the accident?

E. Was timely notice of the accident given to Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

G. What were Petitioner's earnings?

H. What was Petitioner's age at the time of the accident?

I. What was Petitioner's marital status at the time of the accident?

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. What temporary benefits are in dispute?

_____ TPD _____ Maintenance XXX TTD

L. What is the nature and extent of the injury?

M. Should penalties or fees be imposed upon Respondent?

N. Is Respondent due any credit?

O. Other Prospective Medical

FINDINGS 14IWCC0352

- On 09/10/2010, Respondent *was* operating under and subject to the provisions of The Act.
- On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.
- On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.
- Petitioner's current condition of ill-being ***is not*** causally related to the accident.
- In the year preceding the injury, Petitioner earned $66,008.28; the average weekly wage was $ 1,269.39.
- On the date of the accident, Petitioner was 62 years of age, ***married*** with 0 children under 18.

ORDER

- Compensation is denied. All other issues are moot. Please see decision for case 10 WC 35835.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this Decision, and perfects a review in accordance with the Act and Rules, then this Decision shall be entered as the Decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

7/2/13
Date

JUL 8 - 2013

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

Ronald Wisniewski,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 17794
	) Consol. With	10 WC 35835
Estes Express Lines,	)	
	)	
Respondent.	)	

FINDINGS OF FACT:

PETITIONER'S TESTIMONY:

It is stipulated between the parties that the petitioner incurred an accident while working for the Respondent on February 29, 2008. At the time of the February 29, 2008 accident, the petitioner was 59 years of age, married and had no dependent children under the age of 18. He is currently 64 years of age. The petitioner worked for the Respondent as a line haul driver (truck driver) hauling one or two trailers over the road. He worked for the Respondent in this capacity since July 10, 2000. Before that he worked for other companies as a truck driver. He has been a truck driver for 40 years. Before driving a truck he worked as a laborer in a steel plant, a laborer for bricklayers and as a furniture mover.

On February 29, 2008, after going into the dispatch office and turning in his bills from the freight he brought back, the petitioner walked out the door and fell down the stairs. The petitioner testified: "And I took one step out the door and that was it, feet in the air and down the stairs I went." The petitioner testified that the stairs were soaked with water.

The petitioner did not lose consciousness, but was pretty shaken up. He was seen that day at LaGrange Memorial Hospital where he was referred to his family doctor. He was seen at Willowbrook Medical Center on March 5, 2008 by Dr. Bilotta, a company doctor. There was a diagnosis of a left gluteal and upper back contusion. He then came under the care of Dr. Zindrick on March 18, 2008, after being referred by his family physician, Dr. Christopher Brenner. Dr. Zindrick performed an evacuation surgery to his left buttocks. On April 28, 2008, Dr. Zindrick released him to return to work as of May 5, 2008, and he did return to his normal work duties on that date. He noticed that that his back "wasn't right" as he performed his job and returned to see Dr. Zindrick on May 30, 2008. At that time, Dr. Zindrick recommended physical therapy and a follow-up appointment in one month. However, the petitioner did not undergo such physical therapy and did not return to Dr. Zindrick one month later.

The petitioner was paid TTD during the time he lost from work from March 1, 2008 through May 4, 2008. All of his medical bills for treatment rendered during that period were also paid by the respondent.

After May 30, 2008, the petitioner testified, the next time he saw a doctor for his back was more than 27 months later when he returned to see Dr. Zindrick on September 10, 2008. Dr. Zindrick took him off work. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job. He had had a nice run and made good money. He didn't have to deal with people, which was why he drove trucks in the first place.

During that 27 month period he also saw his family doctor, Christopher Brenner, "[m]aybe once every 2, 3 months."

The petitioner testified that during the intervening time, his back had gotten progressively worse until he couldn't take it anymore. He testified that the pain went down his right leg and his feet were numb. He did not sustain any new accidental injuries between May 30, 2008 and September 10, 2010.

During that 27 month period of time, the petitioner performed, for the most part, his regular work duties. The petitioner testified that at some point in time when his back was sore, he had spotters hook up and unhook the trailers for him so that he would not have to deal with the dollies. He testified that the dispatcher, Ish Thomas, "more or less took care of me."

When the petitioner worked during that intervening period (5/5/2008 - 9/9/2010) he leaned on one side and used the armrest more. He also leaned back to maneuver around while driving to get relief from the pain.

The petitioner testified that he normally works a 10-hour day and would normally drive 628 miles a day. The petitioner testified that the video of the job analysis (R's Ex 5) does not show all of the tasks that he is required to do. In addition to driving, he would also hook up trailers to be hauled. If two trailers were used, a dolly in the middle of the two trailers was required. Such dolly weighed over 3,000 pounds. He would hook the trailer to the dolly (P's Ex 12). As part of the procedure of hooking up the trailers, he would crank up the dolly legs on each trailer. This was fine in summertime but in wintertime "all that stuff froze up; so it was really hard to crank that stuff up and down." Sometimes it was necessary to crawl underneath the trailers to get to the dolly legs and to crank the dolly legs down so that the fifth wheel wouldn't miss the pin on the trailer and then go past the pin.

The petitioner also testified that once the trailer was retrieved, it was dropped on an open spot in the yard. He would then have to retrieve the dolly, pick up the dolly, put it on the back of a pintle hook and drag the dolly back to the trailer. He would then have to find the second trailer.

This required him to pick up the dolly once again and to put it on the pintle hook that is on the back of the first trailer. He positioned the trailers such that the lighter trailer was in the back and the heavier trailer was in the front. Then he would get the dolly, put it on the back of a pintle hook, lock it and drag it over to the trailer that had been dropped. He would back the tractor in front of the trailer and drop the dolly. He would lift the dolly off the hook and push it back a little in front of the other trailer and then go and find the heavier trailer. Then he would hook up that trailer. Once the trailers were hooked up, he would hook up all the hoses and the light cord, two safety chains and roll up the dolly legs on the back trailer, check the tires, check the air hoses and check all the lights. He would get under the first trailer to make sure the lock on the fifth wheel was locked. He also had to open the hood, inspect the engine and close the hood. Finally, he'd get in the truck, straighten out his logbook and write up whatever was required before leaving. These activities took up 5 - 10% of his day versus driving. (1/2 hour to 1 hour vs. 10-11 hour work days)

The petitioner testified that his back pain started right after the February 29, 2008 accidental injury and that the right leg pain came later on.

After September 10, 2010, he applied for and received short-term disability benefits and then he received long-term disability benefits. He has remained off work since September 10, 2010. Dr. Zindrick prescribed back surgery and he wants to have it performed.

The petitioner has had prior workers compensation claims filed with the Illinois Workers' Compensation Commission: case # 95 WC 22261, for injuries to his bilateral shoulders for which he received 45% loss of use of the left arm and 40% loss of use of the right arm; case #08 WC 04932 against Estes Express, when a sustained a hernia, for which he received 2% loss of use, man as a whole; and case #86 WC 25799 against JAM Trucking, which proceeded to arbitration, and was awarded 10% loss of use of a left arm and 10% loss of use of a left leg.

The petitioner admitted to being in a motor vehicle accident on January 14, 2011 on his way to Dr. Zindrick's office when he was rear ended by another vehicle. The other driver ripped her bumper off and his car was not damaged. On redirect examination, the petitioner testified that Dr. Zindrick's statement in the record that the petitioner sustained "No increased low back pain" after such motor vehicle accident was a fair statement.

TREATING RECORDS:

On February 29, 2008, the petitioner was first seen at LaGrange Memorial Hospital ER (P's Ex. 1) where the following history is recorded: "Patient slipped on steps at work and fell on his left buttocks and left arm. Pain to buttocks and back." He was advised to apply ice 20 minutes every hour for 2 days, get plenty of rest and to follow up with Dr. Brenner, his Primary Care Physician, in 2 - 3 days. He was prescribed Skelaxin, a muscle relaxant medication and Vicodin, a narcotic pain reliever. Both the cervical and lumbar areas of his spine were x-rayed. There was an impression of degenerative disc disease of the cervical spine and C7/T1 could not been seen. Also, the lumbar spine had six lumbar type vertebral bodies. There was a grade I retrolisthesis of L4 on L5. The alignment was otherwise normal. The vertebral body height and disc space height

was well maintained throughout. Anterior osteophytes were seen at all levels. Calcifications are seen over the course of the abdominal aorta. There was an Impression of degenerative disc disease of the lumbar spine without evidence of acute fracture.

On March 3, 2008, the petitioner presented at Willowbrook Medical Center (P's Ex #2) where he gave a history of slipping and falling down wooden stairs, and in the process, falling heavily on his low back and buttocks. The straight leg raising was 80 degrees bilaterally with only mild buttock discomfort on the left at the end range. The Lasegue maneuver was negative bilaterally. He also complained of upper thoracic pain. He was placed off work through March 5, 2008 as he was diagnosed with a left gluteal/upper back contusion. He had a large swelling over his left buttock.

On March 5, 2008, the petitioner followed up at Willowbrook Medical Center wherein he would continue to remain off work through March 10, 2008 due to his left gluteal/upper back contusion.

On March 10, 2008, the petitioner presented for follow up at Willowbrook Medical Center wherein he was prescribed a course of physical therapy three times a week for one week.

On March 12, 2008, the petitioner presented for follow up at Willowbrook Medical Center having undergone therapy that day. There was a resolving ecchymosis and the diagnosis remained a thoracic and buttock contusion.

On March 17, 2008, the petitioner followed up with Dr. Bilotta at Willowbrook Medical Center. At that time, he continued to have buttock and left lower extremity pain. The medical note also indicates significant tenderness to the left upper buttock. Exam revealed tenderness of the right buttock. The sensory, motor, and reflex examinations of the lower extremities were intact. The medical note also indicates: "There is a possibility that patient has some pressure on his sciatic nerve due to the hematoma that could be causing some of the radiated pain." The petitioner was instructed to continue physical therapy. The petitioner was kept off of work.

On March 18, 2008, the petitioner presented for initial examination with Dr. Michael Zindrick at Hinsdale Orthopedics (P's Ex 3). He indicated he fell down six stairs on February 29, 2008 while at work and sustained a contusion to the left buttocks and leg. He was in the process of leaving work to go home when the accident took place. The examination revealed severe ecchymosis and hematoma into his left buttocks and extending down the posterior thigh and up into the lumbar area and total gluteal area on the left side. He had a softball-sized lump in his left gluteus. The petitioner had a "mildly positive straight leg raise for causing discomfort into his buttock area." X-rays taken at LaGrange Memorial Hospital of his lumbar spine showed some degenerative changes. As such, he was diagnosed with partially resolved large gluteal hematoma on the left side. An MRI was ordered in order to evaluate the full extent of this issue.

On March 20, 2008, the petitioner presented for an MRI of the pelvis wherein the findings were notable for a large soft tissue hematoma overlying the left buttocks, and there was a moderate soft tissue edema towards the left. The findings were also suspicious for an undescended testicle.

On March 24, 2008, the petitioner presented for a follow-up appointment at Willowbrook Medical Center. The examination revealed a persistent hematoma on the left buttock, which was approximately the size of 1 - 2 golf balls. That same day, the petitioner followed up with Dr. Zindrick wherein it was decided the petitioner would undergo a left gluteal evacuation for the hematoma.

On March 26, 2008, the petitioner presented at Adventist Hinsdale Hospital (P's Ex. #5) where he underwent an evacuation of his left buttock hematoma. Dr. Zindrick wrote: "He was originally ecchymotic from his lumbar spine to his foot and across both buttocks." The post-operative diagnosis: "Deep post- traumatic hematoma of the left gluteus and buttock."

On April 7, 2008, the petitioner followed up with Dr. Zindrick, status post evacuation of the hematoma and indicated less pain. The wound was clean and dry, and the petitioner was able to walk without assistance. He would remain off work as he should not be moving around in his truck.

On April 28, 2008, the petitioner followed up with Dr. Zindrick at which time he noted some mild discomfort and fluid collection in the area. It was noted the ecchymosis was resolved. The wound was well healed, and he was able to return to work as of May 5, 2008.

On May 30, 2008, the petitioner presented for follow up with Dr. Zindrick. His Progress Notes that day state:

PRESENT HISTORY: The patient has had some increasing pain since he has been back to work into his low back and tailbone area. His gluteal area still is tingling and numb.

PHYSICAL EXAMINATION: The patient can toe-walk and heel-walk. He has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. He is tender over his gluteal region.

X-RAY FINDINGS: X-rays of his back show some minor degenerative changes. No other gross abnormalities are seen.

IMPRESSION: Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with hematoma and resolution of the contusion to his gluteus and buttock area.

RECOMMENDATIONS: Off work until Monday. Physical therapy, core stabilization, low back exercises, body biomechanics, and modalities as needed. Relafen 750 mg b.i.d. He was cautioned about GI upset. Return in a month.

On September 10, 2010, approximately 2 years and 3 months later, the petitioner followed up with Dr. Zindrick. He had complaints of increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." His symptoms were worse with sitting too

long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related in the course of time that he had his gluteal injury, it changed his posture while sitting and this was associated with increased back pain. He also associated significant lifting with the unhooking and loading of trucks coupled with driving extended distances as a means of making his back pain progressively worse. X-rays of his back show significant degenerative changes in his lumbar spine. As such, he was diagnosed with back pain with radiculopathy. Recommendations included an MRI of the lumbar spine and a trial of a Medrol Dosepak followed by Relafen with Norco for pain. He would remain off work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

On September 16, 2010, the petitioner presented for an MRI (P's Ex. #10) of the lumbar spine wherein the findings were notable for a reversal of a normal cervical lordosis with diffuse spondylotic changes, a right paracentral disk herniation at L4-5 with mild to moderate stenosis greater on the right, a left paracentral disc protrusion at L5-S1, and mild canal and neural foraminal stenosis at L1-2, L2-3, and L3-4.

On September 20, 2010, the petitioner had a telephone conversation with Dr. Zindrick's physician's assistant regarding his MRI results and the petitioner indicated that his medication was not helping to alleviate his pain. As such, he was prescribed with Naproxen and Norco.

On September 28, 2010, the petitioner requested a refill of Norco.

On October 1, 2010, the petitioner followed up with Dr. Zindrick, at which time he indicated he was having 40% back and 60% buttock and leg pain. Based on the MRI, the petitioner had a disk herniation at L4-5 on the right, which was consistent with his symptoms. As such, he was diagnosed with a right L4-5 disk herniation with low back pain and radiculopathy. Overall, the petitioner had multiple level degenerative disk disease, but his symptoms fit clearly with his disk herniation at L4-5 on the right. A trial of epidural steroid injections and a course of physical therapy were recommended. If he did not improve, surgical intervention was an option.

On October 14, 2010 and October 28, 2010, he was given transforaminal lumbar epidural steroid injections under fluoroscopic guidance by Dr. Bardfield.

On November 1, 2010, the petitioner presented for follow up with Dr. Zindrick wherein he would remain off work and recommendations included a repeat MRI of the lumbar spine.

On November 16, 2010, the petitioner returned to Dr. Zindrick when his back pain persisted. An EMG/NCV was prescribed and he was advised to remain off work.

On November 22, 2010, an EMG/NCV was performed and the findings were consistent with chronic polyradiculopathy L4 - S1, electrophysiologically with sensory motor polyneuropathy LLE.

On December 13, 2010, the petitioner returned to Dr. Zindrick. His back pain persisted and he continued to use medications and walked with a cane. A myelogram and post-myelogram CT

was prescribed at that time. He was to remain off work.

On January 3, 2011, a myelogram was performed. It revealed, at the L4 - L5 level, the following: "There is prominent posterior protrusion of disc material, greater towards the right. This causes bilateral foraminal stenosis, greater towards the right side . . . There is also mild bilateral bony foraminal stenosis present due to posterior osteophytes." At L5 - S1 level: "There is midline posterior osteophyte/disc complex without spinal stenosis. No significant foraminal stenosis is identified.

On January 14, 2011, the petitioner was seen by Dr. Zindrick and had been involved in a motor vehicle accident on the way to Dr. Zindrick's office. He had neck pain and right shoulder pain. X-rays of his cervical spine were taken which revealed multiple level degenerative disc disease and no acute fracture or injury seen. He had a painful range of motion of his neck with 50% restriction of motion with flexion, extension and rotation.

On February 25, 2011, the petitioner saw Dr. Zindrick and he concluded the petitioner had failed conservative care and he opined that surgery would be of benefit. He proposed to limit the surgery to L4 - L5 with the goal of trying to do a laminectomy and discectomy since his prognosis was guarded due to his multiple level degenerative disc disease. Dr. Zindrick noted that if the segment was found to be unstable, it can be fused at that time and but that he would try to avoid this.

On March 24, 2011, he saw Dr. Zindrick again at which time he was continued on medications and advised not to work. Dr. Zindrick continued his prescription for the L4 - L5 lumbar laminectomy and discectomy surgery.

When the petitioner was seen by Dr. Zindrick on May 3, 2011, June 17, 2011, August 9, 2011, September 30, 2011, December 2, 2011, January 20, 2012, March 16, 2012, April 13, 2012, July 13, 2012 May 25, 2012, and August 24, 2012, his diagnosis and prescription for surgery remained unchanged.

Although the petitioner testified that he saw his family doctor "[m]aybe once every 2, 3 months" during the period of June 2, 2008 until September 10, 2010, he did not offer Dr. Christopher Brenner's records into evidence.

DR. ZINDRICK'S TESTIMONY ON MARCH 14, 2011 (Petitioner's Exhibit #6)

Dr. Zindrick is Board Certified in Orthopaedic Surgery and in Spinal Surgery. He has numerous publications and presentations. He has authored chapters in scholarly medical texts and has served as a faculty member for numerous courses.

Dr. Zindrick testified that the petitioner had completed a Patient Assessment when he first saw him on 3/18/08. On the Patient Assessment, the petitioner indicated that his pain was located in his lower back, buttocks and left leg.

Dr. Zindrick testified regarding the history the petitioner provided to him and the findings, which are contained in his several records. Those findings are outlined in detail above with the summary of his treating records.

Regarding petitioner's back complaints and symptoms, Dr. Zindrick noted that when he first examined the petitioner on 3/18/08 he had a positive SLR test on the left. His primary attention was to the large hematoma on the left thigh, which required surgical evacuation. The petitioner returned to the full duties of a truck driver on 5/5/08. The petitioner returned to Dr. Zindrick on 5/30/08 at which time he complained of increasing pain in his low back and tailbone and tingling into his gluteal area after he returned to work.

The petitioner did not return to see him until 9/10/10, which was over two years later. At that time the petitioner gave a history of his back pain worsening within six months of his original injury and of pain radiating down his right leg. He noted that since his return to work, he changed his posture sitting more on his right side and noted an increase in pain when driving extended distances and lifting while unhooking and loading trucks.

In addition to the records through 11/12/10, Dr. Zindrick noted that another MRI was performed on 11/11/10 and the findings were essentially unchanged from the MRI performed on 9/16/10. The MRI's showed that petitioner had a herniated disc on the right at L4-5 as his primary pain generator, as well as pathology at L5-S1, a protrusion on the left side, and degenerative findings at all levels.

On 11/22/10, an EMG/NCV was performed which corroborated chronic polyradiculopathy at L4-S1. This confirmed his diagnosis of a herniated disc at L4-5.

He saw the petitioner again on 12/13/10 and 1/14/11. On 1/14/11, petitioner was treated for a cervical problem as he was rear ended while driving to his office on that date. There has been no further treatment for his cervical complaints.

On 1/3/11, a lumbar myelogram was performed which confirmed a prominent posterior protrusion of disc material on the right at L4-5. A herniated disc was not confirmed at L5-S1 on the left although there were findings of posterior osteophyte/disc complex without spinal stenosis.

On 2/5/11, Dr. Zindrick felt that the petitioner had failed conservative management (he underwent two ESI's which had increased his pain bilaterally) and recommended that the petitioner undergo surgery at L4-5 for a laminectomy and discectomy although kept open the option of performing a fusion depending on what he found when he performed the surgery.

It was Dr. Zindrick's opinion that the current condition of the petitioner's back is causally related to the 2/29/08 slip-and-fall down stairs, and was also aggravated by the petitioner's work activities following his return to work after being discharged from care on 5/30/08. He noted that the petitioner had back complaints from the time he saw him on 3/18/08, although they were left-sided. Also, according to the petitioner's history on 9/10/10, his back symptoms became

progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right while sitting, while doing extensive driving and while lifting while unhooking and hooking his truck. It was his opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at this time and had been unable to do so since he saw him on 9/10/10.

Finally, he noted that Hinsdale Orthopaedics had an outstanding bill for $19,992.00 for services rendered to the petitioner for treatment, which was causally related to the 2/29/08 accident.

During cross-examination, Dr. Zindrick admitted that when he first saw the petitioner, he did not review the records from Willowbrook Medical Center for 3/3/08 and 3/5/08, which indicated a diagnosis of left gluteal and upper back contusion. When he saw the petitioner on 3/18/08, he was unaware of any upper back contusion as most of the complaints pertained to the left thigh hematoma and the back.

He also admitted that when he performed the SLR test on 3/18/08, it was mildly positive on the left. There were no right-sided complaints until he saw the petitioner over two years later on 9/10/10.

He also admitted that MR images of the petitioner's lumbar spine were not originally taken; only MR images of the pelvis were originally taken in order to evaluate the hematoma.

Dr. Zindrick testified that September 10, 2010 was the first time the petitioner saw him and complained about the right side. At that time he noted petitioner's history of worsening low back pain within six months of his injury. Dr. Zindrick dated the onset of right leg complaints at six months post accident. However, he opined that the back complaints were aggravated by the petitioner's work activities following his return to work as a truck driver.

He opined that the petitioner's main problem is with a herniated disc at L4-5 on the right. This is different than his symptoms when he treated the petitioner in 2008 although he felt the petitioner did have discogenic back pain aggravated by return to work on 5/30/08.

He noted that a myelogram was performed 1/3/11, which confirmed his diagnosis of a right sided herniated disc at L4-5 but not at L5-S1 which had noted a protrusion on the left on the earlier MRI's.

He admitted that he did treat patients who have underlying degenerative disc disease who progress to the point where surgery is necessary without having suffered trauma. He noted that petitioner had a slip-and-fall down stairs, which started petitioner's low back symptoms. These problems were noted during his treatment in 2008. The problem then became aggravated with the petitioner's return to work. Prior to his accident, the petitioner had no complaints, only afterwards. The complaints worsened after he returned to work. Accordingly, his problem was related to the 2/29/08 accident and in part due to aggravating the condition further with his work

activities.

TESTIMONY OF DR. ZINDRICK AUGUST 13, 2012 (P's Ex. #7)

Dr. Zindrick testified for the second time on August 13, 2012. Dr. Zindrick previously testified on March 14, 2011 and indicated that the petitioner's lumbar spine condition was causally related to either the specific work accident on February 29, 2008 or from repetitive trauma following the petitioner's return to work in May of 2008.

Dr. Zindrick did not review the job video during the deposition, but did so prior to beginning his testimony. Dr. Zindrick testified that the video did not change any of the opinions contained in his prior testimony. He commented that the job video reinforced his prior opinion that the petitioner's current condition is causally related to the February 29, 2008 work accident. Furthermore, it was his opinions that the petitioner was a candidate for surgery and is presently unable to work are unchanged. He has been monitoring the petitioner's condition and it remains unchanged.

On cross-examination, Dr. Zindrick testified that the petitioner's condition is causally related to the initial work accident. In his prior testimony, he indicated that it could also be from repetitive trauma. Dr. Zindrick admitted that the petitioner's job duties, as depicted in the job analysis video, were not "repetitive."

On re-direct examination, Dr. Zindrick suggested that the activity that contributed to the petitioner's current condition of ill-being was driving 5-1/2 hours each way with underlying degenerative disc disease and while altering his sitting position. He testified that the petitioner's left buttock hematoma caused him to sit in an unusual fashion and was the cause of his current complaints.

In terms of exhibits entered into evidence, the petitioner presented the written job description from Genex. He also presented a copy of spec. sheet from Hyundai for a "HT Dolly." Opposing counsel claims that this is the dolly used by the petitioner. The sheet contains facts and figures regarding the dimensions and weight of the dolly.

TESTIMONY OF DR. BABAK LAMI ON MARCH 17, 2011 (Respondent's Exhibit #3)

Dr. Lami testified to his credentials as reported on his Curriculum Vitae, a copy of which is attached as a (deposition exhibit Respondents Ex. No. 1). Dr. Lami is Board Certified as an Orthopaedic Surgeon with an interest in pediatric and adult spinal surgery. He is a member of the North American Spine Society. He confines his practice entirely to treatment of the spine. He noted that he and his partner perform over 200 surgeries annually. He devotes over 90% of his time to care of patients. He further testified that he also conducts independent medical exams that are "pretty much 100 percent for - - at the request of the employers." Dr. Lami testified that in 2010, he conducted fewer than 200 independent medical examinations.

He testified to the history, findings and review of treating records as contained in his narrative

report (Respondent's Deposition Ex. No. 2) and as recited in the summary of treatment with Dr. Zindrick above. In addition, he reviewed the additional records from Dr. Zindrick, which he had not previously reviewed including the important second MRI and myelogram.

It was Dr. Lami's opinion that although the petitioner has a right-sided disc herniation at L4-5 and has restrictions, which would prevent him from working as a truck driver, this condition is not causally related to the 2/29/08 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left thigh for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick was a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While an MRI of the pelvis was taken shortly after the accident, an MRI of the lumbar spine was taken until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/5/08 - 9/10/10, at which time he saw Dr. Zindrick for right-sided back complaints including radiculopathy.

Dr. Lami opined that such right-sided complaints were completely unrelated to the original injury, which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of the petitioner's underlying degenerative disc disease.

Accordingly, Dr. Lami opined, this new problem was related to the petitioner's personal medical condition to his work. As far as any work activities aggravating his back, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so at this time, he would experience too much pain to be able to perform his work duties. He concluded that the petitioner's current back condition was unrelated to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010 based upon the following factors: 1) There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2) Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3) The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms, i.e., radiculopathy, immediately or shortly after that; and 4) Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick would have missed them.

On cross-examination, the following exchanges took place:

Q: Well, isn't there a medical note from September 2010 that indicates by history the patient reported experiencing pain down into his right leg within six months of the accident in February 2008?

A: There are no - - if he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg.

He has radicular symptoms due to a personal health issue and he waits until 2010 to see the doctor.

This is not consistent with a traumatic injury. More of progressive over time. In fact, the gentleman waits until 2010 to see the doctor. This is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset.

Q: But there is a medical note that indicates that he reported radicular-type symptoms going down the right leg within six months of the accident.

A: There is a note in 2010 that says what you just stated. (R's Ex. #3, Dep. PP. 30-31).

Dr. Lami did not dispute that the petitioner reported lower back pain to Dr. Zindrick on March 18, 2008. Dr. Lami opined that the February 29, 2008 accident did not aggravate or accelerate the petitioner's pre-existing degenerative disc disease. However, Dr. Lami conceded that someone falling down the stairs could cause a traumatic disc herniation. With respect to his work status, Dr. Lami recommended that the petitioner be placed on sedentary-type work with no bending or lifting more than 10lbs.

TESTIMONY OF DR. BABAK LAMI, M.D. DECEMBER 9, 2011 (Respondent's Exhibit #4)

Direct Examination

Dr. Lami testified that he had previously testified on March 17, 2011, at which time his CV was entered into evidence. At the time of this deposition, that CV was still up to date, he was still in the same practice, and in the same line of work. Dr. Lami recalled that at the time of his previous testimony, the petitioner had a condition of hematoma and some low back condition. Dr. Lami did not have any dispute as to the petitioner having right-sided radiculopathy in 2010. Dr. Lami reported that at the time of his previous deposition, he received a written job description and a video description.

Dr. Lami stated that his opinion was within a reasonable degree of medical and surgical certainty, and that throughout the deposition he would give all of his opinions within that standard.

Dr. Lami's medical report was entered into evidence at that time.

Dr. Zindrick also opined that the back pain could be coming from repetitive bouncing, doing repetitive bending, twisting, unhooking, and unloading the trucks. Dr. Lami reported that he did not agree with Dr. Zindrick's position. Dr. Lami found it interesting that Dr. Zindrick opined the petitioner had an acute injury, but in case it was not acute, he opined it would be repetitive.

Dr. Lami described asymptomatic disc herniations as somebody who does not have nerve pain going down his leg. So the disc herniation pushes on the nerve, which can cause pain going to the leg. That, he stated, would be symptomatic disc herniation. He also stated that an asymptomatic herniation could become symptomatic from different traumas including sneezing or twisting. However, it was possible that no particular trauma existed at all. If the symptoms came from a traumatic event, Dr. Lami opined, it would be reasonable for the symptoms to appear within days of the trauma. However, it would be unreasonable to say that the symptoms arrived within six months or a year down the line. From Dr. Lami's examination of the MRI report, it was his opinion that the problems the petitioner was having were degenerative rather than traumatic. However he did not personally review the MRI, so he was only able to give his opinion based on the review of the MRI report. He was only able to see the description by the radiologist. Based on that description, Dr. Lami opined it appeared to be a degenerative protrusion.

Written Job Analysis

Dr. Lami was given a copy of a written job analysis from Genex. He described the job summary as the driver taking a load from the origin site and delivering it to the destination, which was listed as St. Louis, switching the trailers with another driver, and bringing a new trailer back to the original location. The job usually lasted eleven hours per day, depending on traffic, five days a week. Based on that job description, Dr. Lami opined that there was nothing repetitive in nature that would cause the petitioner's symptoms. Rather, the petitioner was sitting in a cab, driving the truck. This was not, in Dr. Lami's opinion and most medical doctors' opinion, a repetitive action.

Dr. Zindrick described the petitioner's job as repetitive lifting, bending, twisting, unhooking and loading of trucks, and bouncing around in the cab of a truck in an altered sitting position. It was Dr. Zindrick's opinion that all those things could contribute to aggravation or worsening of the petitioner's back condition. Dr. Lami disagreed with that opinion. He believed that a factory line worker, who would be loading/unloading thirty times per minute, would have a repetitive motion. However, the petitioner was not engaging in any repetitive action here. He was driving most of the day, and was hooking and unhooking twice a day. In terms of discomfort from gluteal hematoma, Dr. Lami believed that was an unfounded opinion. Hematomas are very common and resolved, and the petitioner was asymptomatic. Because a hematoma is just a bleeding underneath the skin, which absorbs and goes away, there should not be any altered sitting position or discomfort from a hematoma. Further, the petitioner's hematoma had resolved by the time he was initially released from care in May of 2008.

Video Job Analysis

Dr. Lami had an opportunity to review the video job analysis. While watching the video, Dr. Lami noted that the driver backs up the truck and connects the electric cables to the trailer from the truck. This occurs at each changing, which would be twice a day. The driver uses the crank to lower the trailer, and he rotates his arm in cranking. Next, the driver opens the hood to inspect the engine and closes the hood. Then, the driver uses the crank in the reverse direction, the legs

are lowered to the ground and he is standing slightly bent, in this case he uses both arms while the cables are disconnected. Once the cables are tucked away, the driver drives the truck away, disconnecting the trailer. During all of these actions the driver was mostly standing. Dr. Lami noted that the driver did, at one point, flex his lower back to thirty, forty degrees to lift it up, but again, he was mostly standing. Once the driver arrives at his destination, he connects the trailers and reconnects the cables. At that time, he goes under the trailer, inspects the lower part, and uses the crank again. Dr. Lami noted that even though the petitioner had to engage in a cranking motion twice a day, there was nothing about that task that could have aggravated a preexisting back condition.

Regarding Dr. Zindrick's Report

Dr. Lami was asked about Dr. Michael Zindrick causation opinions. On direct examination, the following exchange took place:

Q: Doctor, I want to show you page 54 of the deposition from Dr. Zindrick that you previously reviewed. Would you please look at the answer portion of that page and read that into the record?

A: Dr. Zindrick said, "Well, the symptoms can change, and clearly he did not have right leg radiculopathy when he first saw me. He did have back pain. He had ongoing back pain that ultimately evolved into right leg discomfort or right leg pain and discomfort with a right-legged disc herniation. Now, traumas can result in weakening of the disc fibers, the annulus, and over time it can evolve into a full-blown disc herniation."

"So, between, as I mentioned earlier, the combination of the fall resulting in an ongoing chronic bachache, then this gentleman returns to his job of vibratory exposure, sitting abnormally, repetitive bending, twisting, lifting, loading and unloading trucks, hooking and unhooking trailers."

"A combination of those factors could very easily, and very consistent with medical knowledge of how disc herniations occur, result in the progressive disc herniation six months down the line and the onset of leg symptoms; and as time goes on, it's gotten worse."

Q: Now doctor, we've just discussed that you reviewed the written Job Analysis and the video Job Analysis for the Petitioner's job. Taking those into consideration, do you agree or disagree with Dr. Zindrick's opinion?

A: I don't agree, and I don't see how he can give this opinion based on reasonable medical and surgical certainty.

Q: Could you explain why you don't agree with that?

A: Because having degenerative changes in the general population is very common, and the degenerative changes can weaken the fibers of the disc. In addition, his previous MRI after his

injury showed diffuse spondylitic changes. Although there was a right-sided disc herniation at L4-L5, there was also left-sided (sic) disc herniation at L5-S1.

How can you tell me, based on a reasonable degree of medical certainty, that the fibers were weakened by a particular event, which didn't result in radiculopathy, not caused by degenerative changes, which are more consistent with natural history and the way he presented to providers?

So, the fact that the patient had no symptoms coming from the disc, no one can say, based on a reasonable degree of medical certainty, that anything was from that disc months or a year later. (R's Ex 4, pp. 19-21)

In conclusion, Dr. Lami opined that the petitioner's low back condition was not related to any injury or activities of employment, and that it was due to his personal health and degenerative changes.

Cross-Examination

Dr. Lami reported that the only examination he had of the petitioner was on November 12, 2010. His October 12, 2011 addendum was solely based on some additional medical records that he reviewed regarding the petitioner, the written job analysis with which he was provided, the videotape job analysis, and his review of Dr. Zindrick's deposition transcript.

Dr. Lami noted that during his original deposition, he did not disagree with Dr. Zindrick's diagnosis or his treatment options. Dr. Lami noted that at the time he saw the petitioner, he only knew that the petitioner was a truck driver. He was not aware at that time that the petitioner had to engage in hooking or unhooking of the truck as a part of his job description. Dr. Lami did not learn of these requirements until he saw the video following his evaluation of the petitioner.

Dr. Lami was asked to review the video job analysis once again. This time, his testimony was focused on the driver's cranking. Dr. Lami indicated that he did not know how much force was needed to operate the crank, since the video did not show any numbers. Therefore, the amount of force needed to move the crank could vary based on certain conditions including different weather conditions, the weight of the specific load or the different positions of the trailer. Even so, from the video, Dr. Lami opined that the force appeared to be not very significant either with one hand or two. He believed it was within the petitioner's capability. Dr. Lami reported that in terms of the other activities the driver was performing in the video, it was difficult to know how much force was being used since the video does not indicate any weight measurements. However, he agreed that the driver in the video appeared to be using some resistance, and force. Dr. Lami was hesitant to say that it was "possible" for the repetitive cranking the petitioner had to do had a cumulative effect on his back condition.

Dr. Lami agreed that the driver in the video had to move a three thousand pound dolly by lifting the front end of the dolly in order to connect it to the trailer, and then lifting it again to disconnect it. While doing this, the driver used both hands and arms and was bent over. When asked whether it was possible that the petitioner's lumbar condition resulted from the repetitive

action of working with the dolly over a period of two and a half years, having to maneuver, lift, push, pull, and place that dolly at least one hundred times, Dr. Lami opined that while anything was possible, he did not believe that lifting one hundred times in the period between May, 2008 and September, 2010 could cause the petitioner's back issues. Dr. Lami agreed that it was possible that his personal definition of repetitive activity was different from that of Dr. Zindrick's as well as any other doctor. However, he emphasized that he was giving his opinion based on a reasonable degree of medical and surgical certainty.

Dr. Lami was asked to review the job analysis. He noted that under the heading "pre-trip inspection", a driver was instructed to pull the hood forward to open by using his legs as leverage. He was to place his foot on a bumper of the truck and pull the hook back. He was to check the levels of fluid and push the hood shut when finished. In order to shut the hood, the driver was to use his leg and arms as leverage to prevent the hood from slamming thus. Under the "arriving to origin location" heading, a driver was advised that he may need to pick up the dolly in order to physically connect the dolly to the trailer. In order to do this, the driver was to use two hands, physically move the dolly (the dolly is on wheels) to the trailer, and connect the wires. Based on that description, Dr. Lami agreed that part of the petitioner's job was to physically move and connect the three thousand pound dolly.

Dr. Lami also opined that the hematoma that the petitioner had sustained on February 29, 2008 had resolved by the time Dr. Zindrick last saw him on May 30, 2008 (Yet, the May 30, 2008 Progress Note indicates that the petitioner experienced tenderness, tingling and numbness over the left gluteal region on that date).

Re-Direct Examination

Dr. Lami reported that as of the present date, December 9, 2011, he did not have any information or reason to dispute Dr. Zindrick's treatment of the petitioner. Further, he did not have any reason or basis to dispute his diagnosis of the petitioner's condition. However, Dr. Lami did not agree with Dr. Zindrick's opinion as to the cause of the petitioner's low back condition.

Dr. Lami was asked to review the "crank section" of the physical demand/ tools and equipment section of the job analysis. Based on his review, he stated that it took approximately three to fourteen pounds of force in order to move the crank. That three-to-fourteen pound range accounted for the variables that Mr. Januszkiewicz spoke about during his cross-examination. Further, Dr. Lami noted that the hood weighed about twenty-four pounds as described in the job description. Finally, Dr. Lami noted that although the dolly itself weighed three thousand pounds, Dr. Lami had never met anybody who could lift three thousand pounds, and he had never given anybody a three thousand pound lifting restriction when they went back to work. In other words, he reported that while the dolly itself weighed three thousand pounds, the driver is not actually lifting three thousand pounds. The dolly is on wheels.

Dr. Lami reported that he is a diplomat of the American Board of Orthopaedic Surgeons, and that he keeps up with his research and literature related to his practice.

Re-Cross Examination by Mr. Januszkiewicz

During re-cross examination, the following exchange took place:

Q: Doctor, again, it sounds like you're saying it's impossible that the repetitive activities in Mr. Wisniewski's case would have aggravated or exacerbated or accelerated his preexisting condition; correct?

A: Very close to it, yes.

Q: It's impossible from a medical standpoint, based on the question just asked you by counsel?

A: Correct. (P's Ex 4, pp. 55-56)

Dr. Lami agreed that the petitioner did not have to pick up the dolly itself and merely engaged in pushing and pulling the dolly that was on wheels.

CONCLUSIONS OF LAW:

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

F. IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The petitioner testified that following his February 29, 2008 accident, he was released to return to regular-duty work by Dr. Zindrick on May 5, 2008. He returned to work at that time and performed his regular work duties. He next saw Dr. Zindrick on May 30, 2008. X-rays of his back showed some minor degenerative changes. He complained of increasing pain into his lower back and tailbone area since his return to work. Dr. Zindrick offered the following impression: "Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with a hematoma and resolution of the contusion to his gluteus and buttock area."

Although Dr. Zindrick's "impression" was diskogenic back pain, he did not conduct a straight leg raising test or order a lumbosacral MRI. Moreover, the petitioner was able to toe-walk and heel-walk.

The petitioner testified that at some point after his back started bothering him, his dispatcher took care of him and had spotters perform the hooking and unhooking of trailers.

The petitioner next saw Dr. Zindrick on September 10, 2010, which was more than 27 months later. At that time, the petitioner followed up with Dr. Zindrick for complaints of increased pain in his lower back. The petitioner described a worsening of his lower back pain and within six months of his original injury, pain that radiated down his right leg and has progressively worsened. He told Dr. Zindrick that his symptoms were worse with sitting too long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related that while he was recovering from his gluteal injury, he had to change his sitting position. He put more weight on his right side, and this was associated with increased back pain. He also associated his progressively-worsening back pain with the significant lifting he performed when hooking and unhooking dollies, opening the truck hood and driving extended distances. X-rays of his back showed significant degenerative changes in his lumbar spine. Dr. Zindrick's offered the following impression: "Back pain with radiculopathy." Dr. Zindrick ordered an MRI of the lumbar spine and prescribed a trial of Medrol Dosepak followed by Relafen with Norco for pain. Dr. Zindrick opined that the petitioner was unable to return to work. He opined that the petitioner's current complaints and symptoms were related to his previous work-related injury.

In this case, 11 WC 17794, the petitioner alleges that on September 10, 2010, he sustained an injury that arose out of and in the course of his employment by the respondent and that his current condition of ill-being of his lumbar spine is causally related to this accidental injury. The petitioner alleges that he suffered a repetitive trauma with a manifestation date of September 10, 2010.

During his first deposition, Dr. Zindrick testified, on direct examination, as follows:

Q: And you testified it was your understanding he had returned to his regular work activities; correct?

A: That's correct.

Q: Doctor, do you have an opinion within a reasonable degree of medical and surgical certainty whether Mr. Wisniewski's work activities after May 30th, 2008, and when he returned to you - - I'm sorry, his work activities after May of 2008 when he returned to work as a truck driver, and between that period and when he returned to you in September of 2010, do you have an opinion as to whether or not the work activities might or could have caused, aggravated, accelerated, in whole or in part, the condition of Mr. Wisniewski's low back and for which he sought treatment with you?

A: Yes.

Q: And what is your opinion?

A: I think that's certainly more likely than not the case, in that in his history as he described it is clear on that that he did repetitive lifting, bending, twisting, unhooking and loading of trucks, in addition spent time bouncing around in the cab of the truck in an altered sitting position often times due to his prior gluteal discomfort. All of those things would contribute to aggravation or worsening of a back condition. (P's Ex 6, pp. 30-31)

The Arbitrator notes that the petitioner testified that he "never had to touch any freight or anything like that", and that "[e]verything was sealed", i.e., the truck was sealed.

Before Dr. Zindrick offered his opinions during his second deposition (P's Ex 7), petitioner's counsel asked him to review the job analysis video (R's Ex 5), the Genex job analysis (R's Ex 1) and the specifications of the HT dolly (P's Ex 12). Dr. Zindrick then testified, with the understanding that the petitioner drove approximately 11 hours a day, that the vibration associated with driving coupled with the abnormal position when sitting (during the hematoma recovery), can aggravate or accelerate the petitioner's back condition. Furthermore, Dr. Zindrick testified that assuming the arbitrator determines that the Genex job analysis and job analysis video are accurate representations of petitioner's duties, he continues to hold the same opinions that he held during the first deposition.

On cross-examination of Dr. Zindrick, the following exchange took place:

Q: Just to clarify, you mentioned earlier the activities you saw on the video in the context of the petitioner's workday (sic), you would not qualify that as repetitive. Correct?

A: It wouldn't be what I would call a repetitive activity such as somebody who did that day in and day out, those activities, many times or hundreds of times a day, no. I wouldn't call it repetitive.

Dr. Lami agreed with Dr. Zindrick that there was nothing repetitive about the work that the petitioner performed since he returned to work on May 5, 2008.

In terms of aggravating his back by his work activities, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so, he would notice too much pain to be able to perform his work duties.

On redirect examination of Dr. Zindrick, the following exchange took place:

Q: And, Doctor, you have previously testified about the interrelationship of the original - -And this is in response to your question on cross that I know is beyond my direct but I have to inquire. You have previously testified about the relationship between A, the original trauma that this gentleman sustained when he fell down the stairs and B, the work he performed upon his return to work, in particular during that six months. Can you briefly describe what role the work that he performed in the ensuing six months upon his return to work had when superimposed on the earlier trauma?

A: Well, again when he first fell he complained of some back pain as well. Most of the pain was in his buttock and we repaired or drained the buttock hematoma. He has a dead space; he has fibrous tissue. He has a large area that's now going to be scarred and painful. And now he returns to work and is going about his normal routine and sitting on this surgical area for as we have gone over today down and back from St. Louis on a daily basis. That would be uncomfortable. And alterations in the sitting posture can - - will definitely load the spine differently and can make previously asymptomatic conditions symptomatic or minimally symptomatic conditions worse. And I would challenge any one of us to sit, you know, off of one buttock for a five-and-a-half-hour period intermittently on a drive to St. Louis and back every day and not have a back ache (sic), especially with underlying degenerative disc disease. It just doesn't make sense.

Clearly, Dr. Zindrick viewed the petitioner's driving, especially during the time he was recovering from the gluteal hematoma, as the "repetitive" activity that could or might have aggravated the petitioner's underlying degenerative disc disease and led to the L4-L5 herniation.

Dr. Lami opined that the activity of driving a truck would not constitute, or result in, repetitive trauma.

The Arbitrator places great weight on the fact that other than the history he gave to Dr. Zindrick 2-1/4 years later and thereafter, the petitioner has not provided any documentary evidence that his back pain began to worsen during the 6-month period after the accident, or that his radicular,

right leg pain began at that time. The petitioner treated with Dr. Brenner every 2-3 months during 27-month period . . . and yet, he did not offer Dr. Brenner's records into evidence.

The Arbitrator draws the reasonable inference that Dr. Brenner's records do not support the petitioner's workers' compensation claim.

Furthermore, a review of the Adventist LaGrange Memorial Hospital reveals that although the petitioner treated for other conditions during this 27-month period, there is no mention of low back pain or radicular right leg pain in such records.

Accordingly, the Arbitrator concludes that the petitioner failed to prove that he suffered an accidental injury as a result of repetitive trauma that manifested itself on September 10, 2010, and the petitioner failed to prove that his current condition of ill-being is causally related to the alleged accident.

Please see Robert D. Williams v. Indus. Comm'n, 244 Ill.App. 3d 204, 614 N.E.2d 177 (1st Dist. 1993).

Therefore, compensation is hereby denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RIGOBERTO RODRIGUEZ,

Petitioner,

14IWCC0353

vs.

NO: 08 WC 04096

CARLANDER DRYWALL CONTRACTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was a Drywall Hanger for Respondent. A sheet of drywall weighed 140 pounds. He lifts them alone, unless he is placing drywall on the ceiling, in which case he has help. He worked 40 hours per week.

2. On May 26, 2006 Petitioner was placing drywall in a garage. After thinking he had securely screwed it into the wall, Petitioner bent down to pick something up. While trying to stand up, the drywall fell down on top of Petitioner. He felt a pinch in his low back, but ignored it. After lunch he was unable to stand up after having sat down to eat.

He required assistance in standing.

3. Petitioner treated at Lansing Chiropractic on June 14, 2006. His treatment consisted of traction, chiropractic manipulations and an ultrasound. On July 6, 2006 he was sent for a lumbar MRI. An orthopedic surgeon named Dr. Khan examined him on July 29, 2006 and recommended an EMG and returned Petitioner to work with medication, a brace and light duty restrictions. Petitioner underwent the EMG August 9th, and was then referred by Lansing to Dr. Earman on August 25th. Dr. Earman prescribed therapy and medication. On September 29, 2006 Dr. Earman administered an injection in Petitioner's low back. In October 2006 Dr. Earman returned Petitioner to full duty.

4. On December 21, 2006 Petitioner presented to Dr. Earman with complaints of increased low back pain. Petitioner was referred to Dr. Carabene, who recommended a discogram on December 21, 2006, which Petitioner underwent January 30, 2007. Petitioner then underwent a CAT scan. On February 7th Dr. Earman recommended surgery. On April 25, 2007 Dr. Heim recommended a two-level fusion. After reviewing another MRI on July 18, 2007, Dr. Heim scheduled Petitioner for surgery, which occurred July 26, 2007. Upon follow up, Dr. Heim prescribed medication and x-rays and told Petitioner to wear a back brace for 6 weeks. On September 19th Petitioner was told to discontinue wearing the brace and was started on a different medication and physical therapy.

5. Approximately 5 weeks later Petitioner began work hardening. After completing it he underwent an FCE. On December 11, 2007 Dr. Heim recommended Petitioner return to work for 6 weeks within the restrictions of the FCE. After a January 23, 2008 CAT scan Petitioner was returned to light duty.

6. Petitioner visited Dr. Earman February 8, 2008, who also released him to light duty with physical therapy and medication. At this point, Respondent had no light duty available, however. Petitioner continued treating with Dr. Earman through February 6, 2009. At that point he was referred to Dr. Huddleson for pain management on February 16, 2009. He has not seen him since as Respondent did not authorize further treatment.

7. On January 18, 2010 Dr. Earman issued restrictions of no repetitive bending and lifting ladders and overhead activity, with weight restrictions of 20 pounds.

8. On February 21, 2011 Petitioner saw Dr. Huddleston and complained of low back pain. He was prescribed Percocet and Oxycontin. One month later the prescriptions were renewed.

9. In April 2011 Petitioner was recommended for a spinal cord stimulator, which was never approved by Respondent.

10. On June 21, 2011 Petitioner was hired at P.F. Chang's as a part-time dishwasher for

$9.50/hr. The job required standing, bending, turning, twisting. Petitioner stated that he told P.F. Chang's of all work restrictions prior to being hired. Once he began working for P.F. Chang's, Petitioner began to notice increased low back pain radiating to his legs. He was terminated in the beginning of July, as he was unable to perform his duties.

11. Jackie Ormsby, a vocational rehab counselor, interviewed Petitioner with assistance from an interpreter. Ms. Ormsby opined that the P.F. Chang's Dishwasher position was above his work restrictions. It required him to stand 5-6 hours. An August 2012 Functional Capacity Evaluation revealed that Petitioner could only perform light to medium physical demand level work. He was able to work 8 hours, but stand for only 4, in 35 minute increments.

12. In June and July of 2011 the union pay scale for residential Drywallers such as Petitioner was $33.47/hr. On October 1, 2011 the scale was $31.37/hr., through September 30, 2012. On October 1, 2012 the scale rose to $32.12/hr.

The Commission affirms the Arbitrator's rulings on causal connection and nature and extent.

The Commission, however, modifies the Arbitrator's ruling on the wage differential. The Arbitrator used the yearly union rate of pay for a Drywaller and the $9.50 per hour rate of pay at P.F. Chang's to calculate Petitioner's wage differential. The Operating Partner at P.F. Chang's stated that a dishwasher could work up to 40 hours per week. The Culinary Partner at P.F. Chang's stated that an evening dishwasher would work 30-38 hours per week. The Arbitrator used the 40 hours per week alluded to by the Operating Partner in calculating wage differential. The Commission views the evidence slightly differently. With no valid evidence pointing to a specific amount of weekly hours worked in order to calculate the wage differential, the Commission takes the average of the two Partners' statements, which is 35 hours per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner a wage differential based on two-thirds of the difference between Petitioner's potential rate of pay as a Drywaller and the $332.50 per week Petitioner was earning while employed with P.F. Chang's. The $332.50 is based on Petitioner earning 9.50/hr. at P.F. Chang's while working 35 hours per week. The differential amount is still subject to the wage differential dates provided in the Arbitrator's Decision (which adhere to the fluctuating Drywaller pay scale mentioned in paragraph 12 above).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014
O: 3/6/14
DLG/wde
45

David L Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, RIGOBERTO
Employee/Petitioner

Case# **08WC004096**

14IWCC0353

CARLANDER DRYWALL CONTRACTORS
Employer/Respondent

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1836 RAYMOND M SIMARD PC
221 N LASALLE ST
SUITE 1410
CHICAGO, IL 60601

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JOSEPH BASILE
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0353

Rigoberto Rodriguez
Employee/Petitioner

Case # 08 WC 4096

v.

Consolidated cases:

Carlander Drywall Contractors
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Falcioni, Arbitrator of the Commission, in the city of New Lenox, on 5/14/13. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ What temporary benefits are in dispute?

☐ TPD ☒ Maintenance ☐ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other

14IWCC0353

FINDINGS

On 5-26-06, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident. See attached Memorandum Arbitration Decision.

In the year preceding the injury, Petitioner earned $65,686.92; the average weekly wage was $1,263.21.

On the date of accident, Petitioner was 34 years of age, married, with 3 children under 18.

Petitioner has received all reasonable and necessary medical services.

Respondent has paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $23,339.69 for maintenance, and $59,563.91 for other benefits, for a total credit of $82,903.60.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

The Arbitrator finds the prescriptions of $515.390 are not reasonable and necessary. See Memorandum Arbitration Decision.

The respondent shall pay petitioner maintenance benefits of $842.14 per week for 27-5/7th weeks, commencing on December 15, 2010 through June 26, 2011 as provided in Section 8(a0 of the Act. See Memorandum Arbitration Decision.

The respondent shall pay petitioner permanent partial disability benefits of $636.53 a week from June 27, 2011 through September 30, 2011 representing 13-5/7th weeks because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

The respondent shall pay permanent partial disability benefits of $583.20 a week from October 1, 2011 through September 30, 2012 representing 52 weeks because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

The respondent shall pay petitioner permanent partial disability benefits commencing on October 1, 2012 of $603.20 a week for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Richard E Ahrens — May 27, 2013

Signature of arbitrator — Date

ICArb

MAY 29 2013

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

14IWCC0353

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rigoberto Rodriguez,	)	
	)	
Petitioner,	)	
	)	
vs.	)	08 WC 4096
	)	
Carlander Drywall Contractors Inc.,	)	
	)	
Respondent.	)	

MEMORANDUM ARBITRATION DECISION

FINDINGS OF FACT

This case was previously tried on November 19, 2009, November 15, 2010 and December 14, 2010 pursuant to Section 19(b). An Arbitration decision was filed on January 11, 2011 finding a causal relation between the accident of May 26, 2006 and the petitioner's current condition of ill-being. Maintenance benefits were awarded at $842.14 per week for 21-6/7th weeks from September 14, 2009 through November 19, 2009 (9-4/7th weeks) and September 20, 2010 through December 14, 2010 (12-2/7th weeks). In addition there were awards for medical expenses, attorney fees and additional compensation as provided in Sections 19(k) and 19(l). The Commission affirmed the decision on February 16, 2012, 12 I.W.C.C. 0171.

The present hearing involved multiple witnesses who testified by deposition and the testimony of the petitioner. A summary of the witness testimony follows.

The petitioner testified vocational rehab started again in February 2011 with Med Voc. It had stopped since September of 2010. The petitioner met with Diamond Warren. She provided him job leads. He submitted employer contact sheets to Ms. Warren. These covered the period from February 2011 through July 2011 (P. Ex. 1; R. Ex. 5).

The petitioner estimated he provided resumes and applications to approximately 60 employers. He estimated he gave only resumes to 30 employers and only job applications to 25 employers. He did not always leave a job application. Not all employers were accepting them. He testified he always tried to leave an employment application. On the employer contact sheets he made notes as to whether he left a resume, application or both.

A job lead was provided by Diamond Warren for P.F. Chang's on June 21, 2011. This was for a dishwasher job paying $9.50/hr. that was part-time. There was no schedule of the hours he would work a week. A paper was put on the wall advising who would be working the following

day. He testified he worked 3 days the first week and one day the second week. He stated the job required that he stand, turn and bend because the dishwasher machine was big. He had to move the plates and to do this, he had to twist and bend. He twisted continuously. He worked evenings. He noted increased pain near the surgical area and above it that radiated into his legs from working. As a result, he would sit down. He was terminated because he could not do his job.

A letter was sent in July 2011 advising that MedVoc was stopping vocational rehabilitation. He testified he was willing to work with MedVoc at that time. He has not heard from MedVoc since July 2011. He admitted he has not looked for any employment since July 2011 stating that because of his restrictions, he does not know what he could do and he does not know where he could look.

At the time of his accident on May 26, 2006, he was a member of the union doing residential carpentry work. The parties agreed to the union pay scale wages for the applicable periods of time. The parties stipulated that as of July 2011, the hourly rate was $33.37. From October 1, 2011 through September 30, 2012, the hourly rate was $31.37. From October 1, 2012 to September 30, 2013, the hourly rate is $32.12. He was a member of the union 24 years. A regular schedule was 40 hours, 5 days a week. He claimed work was always available.

He testified that he had various appointments with Dr. Huddleston and would tell him what he noticed about himself. On February 21, 2011, Dr. Huddleston prescribed Percocet and OxyContin. On March 21, 2011, Dr. Huddleston continued those medications and added Ambien to sleep. On April 14, 2011, the petitioner described the side effects from OxyContin (dizziness). Dr. Huddleston put him on Morphine and recommended a trial spinal cord stimulator at either Rush or Northwestern. On June 30, 2011, Dr. Huddleston again recommended the spinal cord stimulator and this was not approved. On July 18, 2011, Dr. Huddleston renewed the prescriptions and added new work restrictions.

At the request of the petitioner's attorney, the petitioner went to Dr. Huddleston to get a note for an FCE. That was done on August 21, 2012. He saw Dr. Huddleston on September 10, 2012. He was released to work based on the FCE. He continued with Morphine and was now on a Fentanyl patch. On September 26, 2012, a vocational assessment was performed by Jackie Ormsby at the request of his attorney. He saw Dr. Huddleston on January 8, 2013. Dr. Huddleston conducted an examination and prescribed medications.

On February 28, 2013, he told Dr. Huddleston he was having more pain in his back and the area of the surgery, above it and into his legs, particularly his right leg down to his knee.

He has 6 years of education that took place in Mexico. He testified to experiencing an increase in pain with walking, sitting and standing. Morphine and Fentanyl help a little. He identified Exhibit #9 as prescription bills which he paid. He has not been reimbursed for them.

He has not seen Dr. Earman, his orthopedic physician since September 16, 2010.

At the office visit on February 21, 2011, Dr. Huddleston's notes states he was not recommending injections. These had been previously awarded by the Arbitrator and were part of the Decision. Dr. Huddleston instead prescribed medications. The petitioner could not explain the reason for the change. He admitted that on July 18, 2011 that this was the first time Dr. Huddleston issued work restrictions. The reasons for the restrictions were the petitioner's complaints of pain. He admitted that from December 7, 2007 until the FCE his attorney arranged, none of his doctors ordered an FCE. He told Dr. Huddleston on January 18, 2013 that his pain was controlled by medications. He claimed that he told Dr. Huddleston about the automobile accident in March of 2012.

On vocational issues, he admitted he is 41 years old. He had job interviews during the most recent VR sessions. These were at Advanced Auto Home Cleaning Centers of America, Motel 6 and Pro Clean in addition to Chang's. He admitted Ms. Warren provided certain job leads. He admitted he had to conduct job search on his own and make 10 contacts a week. He admitted that he was advised to do volunteer work at St. Joseph's Church at a soup kitchen and refused on advice of his attorney.

He interviewed with Peter at Chang's., They discussed a dishwashing job. He admitted telling them he had a 40 pound lifting restriction. He claimed he told him he had other restrictions. He admitted he was offered a job at $9.50/hr. He admitted there was no significant lifting. He admitted it could go from part-time to full time. He started on June 27, 2011. He testified to leaving work early the second day he worked at Chang's and that his employer told him to leave early. He left early because he was in pain.

He admitted an exam with Dr. Candido on September 6, 2011. Dr. Candido took photos of his back. The interview was conducted in Spanish.

He claimed the FCE of August 21, 2012 was reviewed by Dr. Huddleston who said he was okay to work. He has not conducted any type of job search. He testified Ms. Ormsby did not did not provide him any job leads. He testified he can drive and has no restrictions on his license. He was involved in an auto accident in March 2012 and his vehicle was totaled. He identified 2 photographs of the car. (R. Ex. 26, 27). He continues to receive weekly payments.

He applied for a pension from his union on September 30, 2011. He was denied Social Security benefits in November 2008. On the pension application he listed his retirement date as November 1, 2011. He had to apply for a disability pension because he was not age qualified for a retirement pension. On the application he marked a box stating he did not plan to continue working after his pension begins. He receives a pension of $1,213.00 a month. He admitted he was denied Social Security Disability. (R. Ex. 24)

Julie Bose testified by depositions taken on November 11, 2011 (R. Ex. 10), January 25, 2012 (R. Ex. 11) and March 12, 2013 (R. Ex. 13). She prepared reports between April 5, 2011 and July 28, 2011 (R. Ex. 1). Ms. Bose has been a certified vocational rehabilitation counselor since 1983 (R. Ex. 10 p. 4, R. Ex. 2). Vocational rehabilitation services with MedVoc started again in February 2011. She prepared her reports, (R. Ex. 1) based on information provided by Diamond Warren MedVoc's job placement specialist who worked with the petitioner. (R. Ex. 10 p. 6-8).

MedVoc's role was to provide vocational services and retraining; however, English as secondary language classes were not available at the time. (R. Ex. 10 p. 9) In part, the petitioner's was required to conduct an independent job search contacting a minimum of ten prospective employers per week, five in person documenting that search and providing it to MedVoc weekly. (R. Ex. 10 p 10) Several times he did not meet the five in person contacts and did not fill out applications with each employer that indicated he could complete an application. (R. Ex. 10 p. 10-11)

Ms. Bose targeted positions that did not involve extensive written communication in English and those that could accommodate the petitioner's 40 pound lifting restriction. Examples were maintenance positions, porter positions, auto parts counterman positions and different office cleaning positions. (R. Ex. 10 p. 11-12) MedVoc prepared a resume for Mr. Rodriguez (R. Ex. 4) with his assistance. (R. Ex. 10 p. 20)

As part of her responsibilities Ms. Warren reviewed the petitioner's job seeking skills, spent time going over how to present himself at interviews and assisted in submitting applications on line. (R. Ex. 10 p. 13-14) The petitioner had job interviews in March 2011 and April 2011 at Home Cleaning Center and Advanced Auto. (R. Ex. 10 p. 140-16) Ms. Bose issued a report dated April 5, 2011 in which she noted they were waiting for a call back from the two interviews and recommended continued vocational services. She further recommended the petitioner complete more job applications. (R,. Ex. 1, and 10 p. 16-17)

Ms. Bose recommended volunteer work because it would help fill a gap in the employment history, show prospective employers initiative, develop relationships and contacts and help for the petitioner's work stamina. A position at a soup kitchen was recommended but the petitioner declined on the advice of his attorney. (R. Ex. 10 p. 17-18, R. Ex. 1 4/5/11) An interview was arranged with Motel 6 for a maintenance position on May 12, 2011 . Although the petitioner interviewed well the employer hired another person. (R. Ex. 10 p. 20-21; R. Ex. 1 5/7/11)

Ms. Bose noted that during the month of April 2011 the petitioner needed to be more aggressive in his job search. She observed that during the week of April 8, 2011 he submitted one application. The week of April 15, 2011 he completed three. The week of April 22, 2011 he completed one application. The week of April 29, 2011 he completed two. (R. Ex. 10 p. 21; R. x. 1 5/7/11) She also noted that many of his employer contacts were by telephone instead of in person. She noted that when an employer told him to come in and complete an application he was not doing that. (R. Ex. 10 p.21-22)

The decision was made to target dishwashing positions because there were within his restrictions and unskilled. (R Ex. 10 p. 23-24) Ms. Warren identified such a position at a P. F. Chang's restaurant. The petitioner interviewed for the position and accepted it. He reported it was part time to start and depending on the success of the worker had the potential for full time. Ms. Bose testified it started at $9.25/hour. The petitioner's employment lasted only two weeks. He left early his second day complaining of pain. He went home early twice in the first week. He told Ms. Warren he was terminated because he could not keep up with other workers. (R. Ex. 10 p. 26-28)

Ms. Bose described problems during this time period with the petitioner's job search in addition to the situation with P. F. Chang's. Following up on job leads resulted in the discovery that phone numbers the petitioner listed were disconnected, contact persons identified were not employed and issues on failing to submit an application. Because of these problems and the termination of employment at Chang's she recommended suspension of vocational rehabilitation for a lack of cooperation. (R. Ex. 10 p. 30-31)

Ms. Bose held the opinion that the position at P. F. Chang's was suitable employment which would allow the petitioner to gradually work up his work tolerance since it had been so long since he had worked. She did not think the petitioner made a reasonable effort to perform the job. MedVoc had advised him not to leave work early. In her opinion his complaints of pain and inability to keep up were in his control and led to his dismissal. (R. Ex. 10 p. 31-32) Ms. Bose also testified the petitioner has the ability to seek employment on his own based on the training he has received with MedVoc. She had no documentation of any standing restrictions issued by the petitioner's doctors. She did not think it would be reasonable to provide further vocational services. (R. Ex. 10 p. 32-34; R. Ex. 1 7/28/11)

On cross examination Ms. Bose she conducted the initial vocational assessment and has seen the petitioner on a few occasions since. She agreed Ms. Warren has done the job placement. (R. Ex. 10 p. 34-35) She believed the most recent FCE she reviewed was conducted in 2007 and she may have reviewed it in 2010. (R. Ex. 10 p. 39) She testified it was after the second day at Chang's the petitioner reported to Ms. Warren that he went home early because of pain with prolonged standing. She had a general idea of the bending, lifting and stooping requirements based on her experience as a vocational counselor and the dishwasher dictionary of occupational title description. She was also aware the petitioner explained his work restrictions and the employer agreed to accommodate them. (R. Ex. 10 p. 46-47) She was asked to review the WCS work conditioning report of February 20, 2008. (R. Ex. 21) She found no note indicating they measured the petitioner's standing tolerance.

Diamond Warren testified by deposition on January 27, 2012. (R. Ex. 13) She is a job placement specialist who worked with the petitioner from the start of vocational services with MedVoc back in 2010. She assists clients in finding work within physical restrictions, assists them with interviewing, provides job leads and updates files for supervision with the case manager. She has been with MedVoc since April 2009. (R. Ex. 3 and R. Ex. 13 p. 6-7)

She met with the petitioner on February 24, 2011 and reiterated the job placement protocol describing MedVoc's responsibilities and what his responsibilities were. Mr. Rodriguez was familiar with this from the previous times MedVoc worked with him. Ms. Bose was the case manager. (R. Ex. 13 p.7-9) The strategy was to target maintenance positions, light office cleaning positions, counterparts and clerk positions and customer service positions in Spanish speaking areas. (R. Ex. 13 p. 10) She assisted him in preparing job applications, guidance on interviews and how to explain his work restrictions. Her understanding was that he had a 40 pound lifting restriction. (R. Ex. 13 op. 11)

She recalled he had about five interviews during this time period with Advanced Auto Parts, Home Cleaning Centers, P. F. Chang's, Pro Clean and Motel 6. The details of the interviews are

contained in R. Ex. 1. (R. Ex. 13 p. 13) MedVoc added dishwashing positions because they believed it would be within his restrictions and would open up his chances of finding employment. (R. Ex. 13 p. 14)

She identified R. Ex. 5 as the petitioner's job search results and R. Ex. 6 as her follow up with the employer contacts described in R. Ex. 5. She would call the employers listed and record the information she received in the file and pass it on to Ms. Bose.. (R. Ex. 13 p. 15-16)

She provided the petitioner a lead for a dishwasher position at P. F. Chang's that she found online. She phoned the restaurant to explain the petitioner's situation and lifting restriction, spoke to Bob, and was told they could accommodate. She informed Mr. Rodriguez and arranged for him to apply. This was in June 2011. She went with him to submit the application, reviewed it and found it was completed appropriately. (R. Ex. 13 17-19)

Later the petitioner told her he interviewed at Chang's with Peter and was offered the position. The petitioner told her he explained his work restrictions to the employer and the employer told him that should not be a problem because there is not that much lifting involved. He also told her the job would start part time but could progress to full time. She believes he told her it paid $9.25/hour and would start on June 27, 2011. (R. Ex. 13 p. 20-21

She phoned him the day after he started to see how his first day went and he told her he worked six hours. He was on his way to work and would call her later. He called again that day and told her he left early due to back pain with standing. He was supposed to work six hours. She asked if he had a break to try to figure out ways for him to work the entire dsy. He told her he did have a break and that he stood during the break. She suggested he sit. (R. Ex. 13 p. 22-23)

She continued providing job leads and attended an interview at Pro Clean for an office cleaning position. It was a short interview and he presented well. He had a second interview which she did not attend. He told her after the second interview they would follow up with him. (R. Ex. 13 p. 25-26)

He phoned her to tell her he was terminated by the manager, Joe, at Chang's because he was not keeping up with the other workers. She told him that leaving early twice did not leave a good impression. She later spoke with Joe who told her Mr. Rodriguez was not keeping up and missed two days or left early for two days. Following this Ms. Bose made the decision to end vocational services. (R. Ex. 13 p. 26-28)

Ms. Warren discovered inconsistencies in information the petitioner provided in his employer contact sheets (R. Ex. 5) and her follow up (R. Ex. 6) She prepared a list which documented the consistencies and inconsistencies from February 2011 through July 2011. (R. Ex. 7) She testified to these in her deposition. There were instances where contacts the petitioner identified were not employed at a City Auto Parts, a Subway, Mr. Gyros and Ice Cream, and Pet Smart. She noted that at Crete Garden the petitioner not only listed an incorrect contact (Steve) but also claimed they were not hiring. She testified she spoke to Don the manager who told her there was no employee named Steve and they are always accepting applications. The petitioner did not submit an application. Similar inconsistencies were discovered with T. J. Maxx as to contact

information and hiring. The contact name was wrong and she was told they were accepting applications. Employers listed as Al Warren Oil and Pierre's Flowers had disconnected phone numbers. He also listed a person at Shelly's Deli who did not work there. (R. Ex. 13, p. 29-36) She also discovered he indicated a Pep Boys told him to apply online and he did not and that he also could have applied online with Sears and did not. (R. Ex. 13 p. 37-38) Prior to the job at Chang's he never talked to her about any limitations with standing. (R. 13 p. 37)

On cross examination she testified she is not a certified vocational counselor. She provided the job contacts or leads. He may have made a mistake on the number for Pierre's Flowers but she was not sure and could not recall if she Googled the number. Follow ups she made with City Auto Parts, Mr. Gyros and Pet Smart determined they were not hiring. She also agreed that certain other employers were not hiring. (R. Ex. 13 p. 39-48)

Joseph Caruso testified by deposition on January 5, 2012 (R. Ex. 14) He is the operating partner at the P. F. Chang's where the petitioner was hired. Respondent's exhibit 8 is the petitioner's personnel file. (Exhibit was formerly marked #6)

A dishwasher rinses dirty plates, places them in a rack and feeds the rack into a machine. A dishwasher on the other side unloads the rack and puts the dishes on a shelf. Some load or unload all night. The ones who unload go to the cook line to pick up bus pans and bring them back into the dish pit (area where the dishes are washed). (Tr. p. 7-8)

During the week there are two dishwashers. One may start at 4:00 p.m. and the other at 5:00 p.m. Three work the weekends. The first dishwasher arrives at 9:00 a.m. and work until 2:00 p.m. or 3:00 p.m. (Tr. p. 8-9)

The dish area has a table where the servers place dirty dishes. One of the dishwashers takes the dishes, puts them in a rack, rinses them and slides them into the dishwasher which automatically grabs the rack and does the rest. A shift varies from six to eight hours depending on the night. (Tr. p. 10-11) He testified there are no breaks but there is a family meal where everybody takes a few minutes to eat. If there are three dishwashers one will eat depending on the volume of the night. Breaks depend on the volume of business (Tr. p. 12)

The dishes that are washed are removed and placed on a shelf based on size and shape. He estimated that four to six dishes weighed five pounds at most. The dishes do not have to be dried. (Tr. p. 13-14) Bending is not required to load. You have to reach down. The rack is not lifted. A body turn is used to load or unload. He said you could call it a twist but you could do whatever is comfortable. (Tr. p. 15-16) The third dishwasher will get dirty bus pans and help the servers with the clean dishes. A full bus pan weighs about eight to ten pounds. (Tr. p. 16-18) The third dishwasher also does prep work for food portions. (Tr. p. 18-19)

He recalls the petitioner sitting in a dining room chair during a work shift and asked if he were hurt. The petitioner told him his back bothered him or something to that effect. Mr. Caruso asked if he injured his back at the restaurant and was told no. Mr. Caruso asked if he needed to go home and was told yes. Mr. Caruso is pretty sure the petitioner went home. (Tr. p. 19-21)

After a second similar episode, Mr. Caruso spoke with Mr. Hogrefe, the chef who told him Mr. Rodriguez had back surgery. A meeting took place in an office with Mr. Rodriguez where he explained he was injured at another job and that his back bothered him and he had to sit down. He did not mention any doctor order that restricted standing. Mr. Caruso told him he could not sit down and later in the conversation told him that if he could not do the job he could not have him at the restaurant. He believes this was when the employment was terminated. Mr. Rodriguez told him he had to sit down at times because of his back. Mr. Caruso told him they could not stop everything on a Saturday night so that he could sit for 20 minutes and that once he started taking a break everyone would and that is not how the restaurant operated. (Tr. p. 21-25)

On cross examination Mr. Caruso testified there is no written job description. They have five or six dishwashers that cover all seven days and work 35 to 40 hours depending on volume. The daytime dishwasher's hours are pretty set at 30-33 hours. The nighttime dishwashers are rotated. Normally, a dishwasher works five days a week. (Tr. p. 26-27) Mr. Rodriguez was let go do to lack of productivity and inability to work at the same pace as the other workers. (Tr. p. 27) The pace is quick and you are moving. (Tr. p. 28) He testified there is not always a break on a six hour shift but added: "if you find some downtime...but there is nothing about a break." (Tr. p. 29) There are about four shelves where the dishes are put after washing which are from six inches from the ground and then every 12 to 15 inches. (Tr. 29-30)

Peter Hogrefe testified by deposition on January 5, 2012. (R. Ex. 15) He is the culinary partner at Chang's who oversees the kitchen and all of its duties. Based on his review of R. Ex. 8 he interviewed the petitioner in June 2011. He could somewhat recall the interview. (Tr. 4-6)

The dishes are washed in an automated machine. The dishwashers load it or unload it, restock clean dishes, silverware and anything else that goes through the machine. They also help portion food. (Tr. p. 7)

At the interview Mr. Rodriguez told him he was not able to lift anything more than 40 pounds. Mr. Hogrefe testified the dishwashers did not have to lift over 40 pounds. He told Mr. Rodriguez he did not think that would be a problem. Mr. Rodriguez did not mention any other medical or physical restrictions in the interview including standing, bending and twisting. (Tr. p. 8-9) Mr. Hogrefe could not recall if he offered the position during the interview or later. The starting pay was between $9.00 and $10.00 an hour. (Tr. 10-12)

Shifts for the dishwashers vary depending on the shift. Mr. Hogrefe approves the schedules. He believed he hired Mr. Rodriguez for evenings and his hours would have started between 3:00 p.m. and 5:00 p.m. and work until after the restaurant closed. The restaurant closes Sunday through Thursday at 10:00 p.m. Friday and Saturday it closes at 11:00 p.m. The dishwashers usually leave a half hour after closing. (Tr. 12-13

In general there are two dishwashers during week nights and three on the week ends. The duties vary depending on when they start. (Tr. p. 14-15) One employee will load dish racks picking up plates, putting them in racks and sliding the rack into the machine. The rack has two bars and is nice and easy. You only have to catch the very first maybe two inches of the rack into the beginning part of the machine and the conveyor takes over. (Tr. p. 15-16)

The second dishwasher will unload the cleaned dishes and stack them on a shelf on the side wall. The shelf is within arm's reach. There are four shelves ranging from a foot off the ground to six feet high. (Tr. p. 17) The third dishwasher picks up dishes from the cook line, brings them to the dish area and passes them to the person loading. Someone will take clean dishes back to where they are needed. The bus pans hold utensils and are on the bottom shelf in the dish room. (Tr. p. 18) Dishwashers also move garbage cans and clean up after portioning food and before leaving at night. (Tr. 19-20)

Evening dishwashers in general average 30 to 38 hours a week. (Tr. p. 21) Mr. Rodriguez' application indicated he was available to work any shift. (Tr. p. 22)

He was off the first day Mr. Rodriguez worked. He recalls a sous chef phoning to inform him about back issues. He had a conversation with Mr. Rodriguez who said he would be fine and needed to sit for a little bit. Mr. Hogrefe took him at his word. (Tr. p. 23) After more incidents of constantly sitting down, Mr. Hogrefe tried him out as a wok cook. Mr. Rodriguez did not make it past the first shift and complained his back bothered him from standing in place. (Tr. p. 25-26) Mr. Rodriguez went back on dishwasher duty. Mr. Hogrefe had conversations with the managers about Mr. Rodriguez having to sit down after an hour or two and sit for more than two minutes. (Tr. p. 27) At times he asked Mr. Rodriguez if he needed to go home. He could not recall for sure but believed Mr. Rodriguez went home early twice. (Tr. p. 27-28) Eventually, it was decided there was nothing more they could offer him and they had to part ways. The decision was discussed with Joe Caruso. (Tr. p. 28)

On cross examination Mr. Hogrefe testified about the movements required to put dishes on the shelves involve extending the arms, turning to the side and putting them on a shelf. At times this is done continuously. (Tr. p. 32-33) He repeated that Mr. Rodriguez told him he had a 40 pound lifting restriction which would not be a problem and that Mr. Rodriguez did not say anything about limitations as to standing, bending, or twisting. (Tr. p. 34) Dishwashers are not guaranteed a set number of hours a week. (Tr. p. 36) (Tr. p. 32-33)

Julie Bose's deposition was continued to January 25, 2012. (R. Ex. 11) She identified the employer contact sheets and MedVoc job leads. (R. Ex. 5) and explained the information contained on the employer contact sheets. The potential employer contact sheets were prepared by Mr. Rodriguez. The job leads were from MedVoc. She identified R. Ex. 6 as the review of the submitted contact sheets. Ms. Warren prepared R. Ex. 6. (Tr. p. 64-68) Ms. Bose relies on the information provided by Ms. Warren in order to prepare her vocational reports and opinions. (Tr. p. 70) She described the information Mr. Rodriguez submitted and the results of the follow up with City Auto Parts, Subway, Pierre's Flowers, Progressive Temporaries, T. J. Maxx and Shelly's Deli. (Tr. p. 71-75) The review found inconsistencies with respect to contact persons, phone numbers and whether employers were hiring and/or accepting applications. Respondent's Ex. 7 is a cross reference of exhibits 5 and 6 prepared by Ms. Warren and Ms. Bose. (Tr. p. 75-76) The inconsistent information was a basis for her opinion to discontinue vocational services. (Tr. p. 77) She testified it is important to submit job applications particularly with entry level positions which MedVoc was targeting because the hiring trends change frequently. (Tr. p.77-78)

The respondent scheduled the petitioner for a Section 12 examination with Kenneth Candido, M.D. a pain specialist on September 6, 2011. He testified by deposition on January 10, 2012. (R. Ex. 16) Dr. Candido is certified by the American Board of Anesthesiology and has a sub-specialty certification in pain medicine. (Tr. p. 5, Candido Ex. 1) His report of examination is dated October 6, 2011 (Candido Ex. 2) The report summarizes the records he reviewed, the history he took from the petitioner in Spanish, his findings on examination and opinions.

Dr. Candido determined the findings on examination were minimal with myofascial or muscular pain. He felt the petitioner's description of constant pain at the level of 8 was not corroborated by his examination findings. It was very minimal on exam. There was no radicular pain and no radiculopathy which means pain and sensory loss. All that was identifiable was palpation tenderness about the lumbar spine. (Tr. p. 28)

His diagnoses were status post lumbar spinal fusion, myofascial pain of the lumbar spine, opioid dependence and degenerative disc disease. (Tr. p. 29) Dr. Candido testified the epidural steroid injections were probably acceptable but did not provide any benefit. The use of narcotics (morphine sulfate immediate release and morphine sulfate extended release prescribed by Dr. Huddleston) failed to provide any consistent analgesic benefit. (Tr. p. 31-32)

Dr. Candido testified the petitioner had axial and discogenic pain that was likely related to the described work injury. (Tr. p. 32) He testified the petitioner does not have radiculopathy because he has no sensory or motor loss or changes that he could identify with his physical examination. (Tr. p. 34) He believed the petitioner would benefit from conservative care only including non-opioid analgesics to control symptoms. Non-opioid analgesics would be non-steroidal antiinflammatory medications, or membrane stabilizing medications such as Neurontin or lidocaine and local anesthetics including those provided by a patch preparation. (Tr. p. 35-36)

He did not believe injections such as facet blocks or rhizotomies suggested at one time by Dr. Huddleston wold be helpful because Mr. Rodriguez did not have pain to maneuvers that stress the facet joints such as side bending and lumbar extension. He was able to perform those without symptomatic complaints. (Tr. p. 36-37) He also disagreed with Dr. Huddleston's recommendation for a spinal cord stimulator. He determined there was no foundation for making the suggestion because although the petitioner described radiating leg pain there was no maneuver that Dr. Candido could utilize to corroborate the presence of a radiculopathy. He testified spinal cord stimulation is fairly effective for radiculopathy and radicular pain but not very good for low back pain and the petitioner primarily complains of low back pain. He also was very hesitant to be supportive for the use of a spinal cord stimulator in an individual who failed to derive any symptomatic relief whatsoever from surgery, injections medication or therapy. In his opinion such an individual is likely to fail all modalities directed towards symptomatic improvement or pain control. (Tr. p. 37-38)

Dr. Candido also reviewed various functional capacity evaluations which had the petitioner in the medium work category. He felt the petitioner is not likely to return to heavy work his job entails. He elaborated stating that somebody that is acceptable for the medium level of work is not likely to improve to get to the next level based on his experience with or without interventions or medications. He has not seen that occur. (Tr. p. 38-39)

He felt the prognosis was poor for the petitioner with respect to his medical condition based on his interpretation of the objective findings on examination and his observation of Mr. Rodriguez, his body language and the historical information provided in that Mr. Rodriguez believes he is disabled and not capable of going back to gainful employment. Dr. Candido agreed with Dr. Goldberg that the petitioner was already at maximum medical improvement and capable of returning to work in the medium capacity demand level. He added that the prognosis is poor because he did not think the petitioner had the mind-set to go back and do such work. (Tr. p. 44-45)

On cross examination Dr. Candido agreed the petitioner had limited motion on flexion and extension. Side bending was in the normal range. (Tr. p. 43-44) He believed a restriction of no repetitive bending and twisting would be appropriate. He disagreed that a limitation on standing is common after the fusion the petitioner had stating that it is common in the early phases but not several years after the fact. (Tr,. p. 52-53)

On re-direct Dr. Candido testified the petitioner's subjective reporting of never having pain below 7.5 is atypical and is not commonly found in individuals who have myofascial pain or individuals who have pain of the axial skeleton of a discogenic nature. (Tr. p. 56-57)

Jacky Ormsby testified by deposition on January 29, 2013. (P. Ex. 6) She conducted a vocational assessment of the petitioner on October 10, 2012 at the request of his attorney. (P. Ex. 5) Ms. Orsmby is a certified vocational rehabilitation counselor.

She testified the August 12, 2012 FCE placed the petitioner at a light to medium demand level, work an 8 hour day, stand 4 hours with 35 minute durations, walk for 3-4 hours occasionally with moderate distances. (Tr. p. 9-10) She testified she did not think the petitioner was able to do the dishwasher job at Chang's. (Tr. p. 18) She thought MedVoc's use of the December 2007 FCE was not as valid as to what the petitioner's current medical would be. (Tr. p. 18-19) She testified the petitioner would not be able to perform the job at Chang's because of repetitive twisting and bending. (Tr. p. 19) In her opinion there is no stable labor market for the petitioner because of his education, physical restrictions and his type of work in the past was all physical. (Tr. p. 20) She does not advise any job search because there is no market for the petitioner and that there is really not anything out there he would be able to do. (Tr. p. 22)

On cross examination she testified she did not review any of Dr. Heim's post operative records. (Tr. p. 25-26) She agreed the December 4, 2007 FCE assessed the petitioner for twisting at 30 pounds of rotational activity. (Tr. p. 28-29) She testified the petitioner at age 41 has a work life expectancy of 24 years if he were to retire at age 65 (Tr. p. 34) The August 21, 2012 FCE did not mention how long a break should be taken after standing 35 minutes. (Tr. p. 35-36) She agreed that Dr. Earman did not issue restrictions on standing or twisting at the appointment on January 18, 2010. (Tr. p. 42-43) The petitioner did not provide any data that he conducted a job search after Chang's. (Tr,. p. 44-45, 47) She did not advise him on seeking employment. (Tr. p. 47) According to her report prolonged standing at Chang's was contributing to petitioner's pain. She had no references to problems with twisting, stooping or bending at the job. (Tr. p. 49-50) She did not conduct a transferrable skills analysis or labor market survey. (Tr. p. 52) She agreed

there are minimum wage jobs within a light to medium work category. (Tr. p. 53) She did not provide job leads or contact prospective employers. (Tr. p. 54) She did not research any potential jobs for the petitioner. She agreed he has the ability to look for work. (Tr. p. 55)

Julie Bose testified in rebuttal by deposition on March 12, 2013. (R. Ex. 12) She reviewed Ms. Orsmby's report and deposition, the FCE of August 12, 2013, the Align Network review of the FCE (R. Ex. 19) the depositions of Mr. Hogrefe and Mr. Caruso, Dr. Huddleston's September 10, 2012 record and Dr. Earman's records of January 18, 2010 and September 16, 2010. (Tr. p,. 6-7) This information did not change her opinion that the dishwasher position was suitable employment. (Tr. p. 8-9) She maintained her opinions the petitioner was able to look for work and that it was appropriate to end vocational services. (Tr. p. 9-10) She expressed her disagreement with the opinions of Ms. Orsmby regarding the dishwasher job at Chang's (Tr. p.. 11-12) She did not agree that use of the December 4, 2007 FCE was inappropriate. (Tr. p. 13-14) She disagreed with the opinion there is no stable labor market for petitioner explaining he is marketable, there is work out there for him and he would have been more successful had he given a more aggressive job effort. (Tr. p. 17-18) The fact that he is 41 is also favorable in terms of securing employment. (Tr. p. 18) She did not think he needs a GED to find work. (Tr. p. 19-20) She testified there are light to medium category jobs that would not require training within his capabilities such as porter, light cleaner, call center clerk and customer service clerk. (Tr. p. 20) On cross examination she testified she did not recommend termination of vocational services until after Chang's. She was not able to determine if any of the earlier FCE's assessed the petitioner's standing tolerance. (Tr. p. 26-27)

CONCLUSIONS OF LAW

As to Issue F, Is the petitioner's current condition of ill being causally related to the injury?, the Arbitrator concludes:

The Arbitrator observes the Commission affirmed his earlier determination on this issue in its decision in 12 I.W.C.C. 0171.

The Arbitrator has reviewed the medical records of Dr. Huddleston, (P. Ex. 3) and the testimony and report of Dr. Candido. (R. Ex. 16) Dr. Huddleston's records fail to describe his examination findings. They record the verbal complaints and treatment plan. Dr. Candido's report details his findings on examination. The Arbitrator notes Dr. Candido's conclusion the petitioner has myfascial pain of the lumbar spine and axial and discogenic pain likely related to the described work injury. Based on this, the Arbitrator finds a causal connection between those conditions and the accident.

As to Issue J, were the medical services that were provided to petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?, the Arbitrator concludes:

The only medical bills claimed were for medications prescribed by Dr.Huddleston. (P. Ex. 9) The medications were for Fentanyl, Morphine and Oxycontin. All are narcotic, opioid medications.

Based on Dr. Candido's opinions concerning appropriate medications the Arbitrator finds the prescriptions are not reasonable and necessary. Dr. Candido recommended non-opioid analgesics such as non-steroidal antiinflammatory medications or membrane sustaining medications such as Neurontin, lidocaine and local anesthetics including those provided by a patch preparation.

The Arbitrator also relies on the results of the Utilization Reviews of June 18, 2012 (R. Ex. 17) Morphine sulfate was non-certified for both the MSIR and MSER prescribed by Dr. Huddleston. There is no evidence Dr. Huddleston responded to the U.R. Section 8..7(i)(4) of the Workers' Compensation Act states: "When a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review pursuant to subsection (a) is reasonably required to cure or relieve the effects of his or her injury. The Arbitrator finds the petitioner has failed to meet his burden of proof on this issue.

The Arbitrator finds further support for the denial of the prescriptions from R. Ex. 18 a pharmacy drug review which recommended weaning of the opioid medications in this case.

As to Issue K What temporary benefits are in dispute?, the Arbitrator concludes:

The Arbitrator finds the petitioner was provided vocational rehabilitation services with MedVoc from February 2011 through July 2011. At the previous hearing the Arbitrator awarded temporary benefits be paid through December 14, 2010. Based on the evidence, including the testimony of Ms. Bose and Ms. Warren the Arbitrator finds the petitioner is entitled to maintenance from December 15, 2010 through June 26, 2010 the day before he began employment with P. F. Chang's. The period represents 27-5/7th weeks and is to be paid at the rate of $842.14 per week.

Any further claims for maintenance are denied as the petitioner has admitted to not conducting any form of job search since his termination from P.F. Chang's in July 2011.

As to Issue L What is the nature and extent of the injury?, the Arbitrator concludes:

The petitioner has claimed a permanent and total disability based on the "odd-lot" theory. The Arbitrator finds the evidence fails to support his claim. In *Ceco Corp.v. Industrial Commission,* 95 Ill.2d 278, 286-287/ 447 N.E.2d 842, 845-846, 69 Ill. Dec. 407, 410-411 the Supreme Court summarized the rules for permanent total disability:

"This court has frequently held that an employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. (Citations omitted) The claimant need not, however, be reduced to total physical incapacity before a permanent and total disability award may be granted. (Citation omitted) Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. (Citations omitted) Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. (Citations omitted) In determining a claimant's employment potential, his age, training, education and experience should be taken into account." (Citations omitted)

The Court in *Valley Mould & Iron Co. v. Industrial Commission,* 84 Ill.2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981) commented further:

"Under A.M.T. , (referring to the decision in *A.M.T.C. Co. of Illinois v. Industrial Commission,* 77 Ill. 2d 482, 397 N.E. 804, 34 Ill. Dec. 132 (1979) if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is on the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category, (one who, though not altogether incapacitated for work is so handicapped that he will not be employed regularly in any well-known branch of the labor market (2A. Larson Workers' Compensation sec. 57.51, at 10-164.24 (1980), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant (2 A. Larson, Workmen's Ciompensastion sec. 57.61, at 10-164.97 (1980))."

The Court in *Courier v. Industrial Commission,* 282 Ill. App. 3d 1, 668 N.E.2d 28, 217 Ill. Dec. 843 (1996) elaborated on the burden of proof:

"However, after careful review of the language of *Valley Mould & Iron v. Industrial Commission,* 84 Ill.2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981), quoted in the *Ceco Corp.* decision, we find that the claimant must do more than make a *prima facie* case. In light of *Valley Mould,* the claimant has the burden to initially "establish" that she falls into the odd-lot category, before the burden of proof shifts to the employer to show the availability of work. By using the word "establish," *Valley Mould* requires that the claimant make more than a *prima facie* case. The claimant must prove by a preponderance of the evidence that she falls into the odd-lot category. See *Meadows v. Industrial Commission,* 262 ill. App. 3d 650, 634 N.E.2d 1291, 199 Ill. Dec. 937 (1994) (holding that "claimant has the burden of *proving* that he fits into the 'odd-lot' category of section 8(f) of thee Act: (emphasis added)). Whether the claimant has successfully met his burden is a question of fact for the Commission to determine. (Citation omitted) We believe that the cases which use the term *prima facie* when discussing odd lot, use

that term to mean "initially." See *Meadows,* 262 Ill. App. 3d at 653-54, 634 N.E.2d at 1293-94, 199 Ill. Dec. at 939-40. In other words, those cases hold that the claimant must "initially" establish, by a preponderance of the evidence, that she falls into the odd-lot category, before the burden shifts to the employer to show availability of work. See *Old Ben Coal Co. v. Industrial Commission,* 261 Ill. App. 3d 812, 634 N.E.2d 285, 199 Ill. Dec. 446."

The Arbitrator finds the petitioner has failed to establish by a preponderance of the evidence that he is in the "odd-lot" category.

The Arbitrator notes the following in support of his findings. From July 2011 and up to the present the petitioner made no job search. Instead he applied for a union disability pension on September 30, 2011 advising he was retiring on November 1, 2011 and that he was not planning on working after his pension began. It is also note worthy that he had earlier applied for Social Security Disability and was denied in November 2008. (R. Ex. 24)

In addition the Arbitrator finds the petitioner testimony that he has not looked for a job because he does not know what he can do with his restrictions and does not know where he could look are not credible. Ms. Bose and her reports describe the plan MedVoc utilized to employ the petitioner. She testified he is able to look for work and that had he been more aggressive would have had a successful outcome. His intention to take the disability pension from the union and no longer work strongly demonstrates he has no interest in employment. As mentioned as early as 2008 he sought Social Security Disability. Ms. Bose testified he was not motivated. Ms,. Ormsby agreed that motivation to find employment is significant.

The opinions of Ms. Bose and Ms. Ormsby were at odds with one another. The Arbitrator places greater weight on the opinions of Ms. Bose. Ms. Ormsby was retained for the sole purpose of providing an opinion in support of the PTD claim. Her opinions on the suitability of the job at Chang's, her opinion there is no stable labor market and nothing the petitioner can do are not credible.

An evidentiary issue arose during the deposition of Ms. Warren. The petitioner objected to her testimony for the reason she is not a certified vocational counselor citing the Act. Section 8(a) in relevant part states that "Any vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as ***qualified to render opinions relating to vocational rehabilitation.***" Ms. Warren did not render opinions. She provided job placement services and skills to assist the petitioner. The objection to her testimony is overruled.

The petitioner testified to the number of job contacts made during all periods of vocational rehabilitation going back to the start up with Mr. Luna at Triune. The record establishes Mr. Luna voiced his concerns with the petitioner's efforts stating Mr. Rodriguez should be making more of an effort to seek out new employers and contact these employers for potential positions. Mr. Luna did not think it was appropriate that Mr. Rodriguez took three to four weeks to follow up on a job lead that lead to another person being employed,. (R. Ex. 3 admitted at the 12/14/10 hearing Triune report #6 page four) In his progress report # 5 Mr. Luna commented that Mr. Rodriguez contacted some employers and was asked to come in and fill out applications he did

not follow up and therefore Mr. Luna was not convinced Mr. Rodriguez was strongly committed in looking for work. (R. Ex. 3 admitted at the 12/14/10 hearing report # 5 page 3)

Ms. Bose and Ms. Warren noted the same problems with the petitioner's efforts.. While the petitioner testified in response to his attorney's questions that he more than met his obligations established by MedVoc, the evidence shows that is not true. Ms. Bose and the MedVoc records (R. Ex. 1, 5, 6 and 7) show multiple occasions where employer contacts were not made and employment applications not submitted when it could have been done.

The Arbitrator also adopts Ms. Bose's opinion that the dishwasher position at Chang's was within his restrictions and that he did not make a reasonable attempt to perform the job. The petitioner testified to constant twisting and that he had to stand, turn and bend because the dishwasher was big. Ms. Ormsby on more than one occasion admitted the only problem he related to her was the standing. Both Mr .Caruso and Mr. Hogrefe testified the job did not require twisting and one could make a body turn. The Arbitrator finds the petitioner was not credible in describing the job duties at Chang's. The Arbitrator also finds the petitioner's testimony that he told Mr. Hogrefe he had more restrictions that a 40 pound lifting limitation is not credible. Mr. Hogrefe testified this was the only restriction mentioned. There is no reason for Mr .Hogrefe to not be truthful on this topic. The Arbitrator further notes that the petitioner had three FCE's before the one arranged in August 2012. The first was a baseline at PTSIR on November 6, 2006 which concluded he was at a Medium-Heavy Work Capacity. The second one at PTSIR was on November 27, 2006 which found he was at a Very Heavy Work Level. (R. Ex. 22) The third was at WCS on December 4, 2007 which found he was at a Medium-Heavy work capacity. (R. Ex. 21)

Dr. Heim reviewed the December 4, 2007 FCE on December 7, 2007. He explained to the patient his symptoms were muscular in nature. (R. Ex. 20) The same as what Dr. Candido determined. Dr. Heim released him to medium-heavy work. On January 23, 2008 the petitioner returned to Dr. Heim telling him he worked a few days and was not able to tolerate it particularly because of his tool belt. He repeatedly told Dr. Heim there was no light duty he could perform. Dr. Heim's findings on examination were not significant in that there was no numbness, tingling or weakness. Dr. Heim again told the patient the symptoms were muscular and stressed the importance of keeping up with his exercises. (R. Ex. 20)

Dr. Heim prescribed additional work conditioning which was done in February 2008 at WCS. The sessions were completed on February 20, 2008. The therapist noted Mr .Rodriguez was functioning at the upper limits of the medium classification. (R. Ex. 21) Based on this Dr. Heim issued a permanent restriction on February 26, 2008 to work at a medium demand level. (R. Ex. 20)

The Arbitrator finds MedVocs plan to target positions at a medium classification with a 40 pound lifting limitation was appropriate.

The Arbitrator finds that Dr. Candido's opinion on the petitioner's perception that he is disabled is accurate. It appears this has been the case as far back as when he saw Dr. Heim on January 23, 2008. Statements to the effect that there is no light duty he is able to do, that he has not looked

for work because he does not know what he can do with his restrictions and that he does not know where to look support this. So does his applying for Social Security Disability in 2008 and the union pension shortly after his employment at Chang's terminated. In addition Dr. Candido described the petitioner's pain rating as atypical.

The Arbitrator finds the evidence establishes he is able to work at a medium capacity. While the August 2012 FCE had him at a light-medium capacity there is evidence to suggest the interpretation could be that he tested at a medium capacity. (R. Ex. 19)

In addition Dr. Goldberg felt the petitioner was able to work based on the December 4, 2007 FCE. (R. Ex. 23)

The parties stipulated that once he started at Chang's the respondent paid a wage loss. The Arbitrator finds that a wage loss based on what he would be earning as a residential carpenter and what he would have earned in a successful attempt at work at Chang's is the appropriate award.

According to Mr Caruso the night dishwashers will work up to 40 hours a week. Therefore the Arbitrator uses that as the base for determining the wage loss at an hourly rate of $9.50. The parties stipulated that as of July 2011, the hourly rate was $33.37. From October 1, 2011 through September 30, 2012, the hourly rate was $31.37. As of October 1, 2012 the hourly rate is $32.12 which is the wage the petitioner would be earning as of the date of this hearing.

Accordingly, the Arbitrator awards a wage loss of $636.53 a week from June 27, 2011 through September 30, 2011 representing 134-5/7th weeks. [[1,002.80 - $380.00] x 2/3].

The Arbitrator award a wage loss of $583.20 a week from October 1, 2011 through September 30, 2012 representing 52 weeks. [[$1,25420 - $380.00] x 2/3]

The Arbitrator awards a wage loss of $603.20 a week fom October 1, 2012 for the duration of the disability.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Johnson,

Petitioner,

vs.

No. 10WC006809

14IWCC0354

Yellow Roadway Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, the necessity of medical treatment and temporary disability, and being advised of the facts and the law, clarifies and corrects the decision of the Arbitrator, as stated below and otherwise affirms and adopts the decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

In this case, the Commission conducted two section 19(b) hearings in which Petitioner requested emergency medical treatment. An Arbitrator conducted the first hearing on July 27, 2010, and the Arbitrator found that the accident was compensable, and that the medical treatment was reasonable and necessary, and caused by the accident.

Subsequently, Petitioner requested a second section 19(b) hearing. A different Arbitrator conducted the second section 19(b) hearing which was held on January 18, 2013, almost three years after the first section 19(b) hearing. The second Arbitrator found that the Petitioner's then current-condition was not caused by the accident.

The Commission affirms the Arbitrator's decision, but clarifies that a previous section 19b decision determining causal connection and temporary total disability has no preclusive effect on the same issues in subsequent hearings. In short, each section 19(b) proceeding is a separate proceeding, limited to a determination of temporary total disability up to the date of the hearing, and a second arbitration hearing involves different legal and factual issues than a first arbitration hearing. See *Weyer v. The Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 297, 307, 900 N.E.2d 360, 369 (1st Dist. 2008); and *R.D. Masonry, Inc. v. The Industrial Comm'n*, 215 Ill. 2d 397,408, 830 N.E.2d 584, 591-92 (2005).

The Commission corrects the temporary total disability rate to $603.60.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on January 24, 2013, is hereby clarified and corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all medical bills related to his lumbar spine condition incurred on or before December 3, 2010, under §8(a) and §8.2 of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $603.60 per week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, which is the period of temporary total disability for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 12 2014

DATED:
ML/db
o-01/22/14
44

Michael P. Latz

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

JOHNSON, KENNETH
Employee/Petitioner

Case# **10WC006809**

14IWCC0354

YELLOW ROADWAY CORPORATION
Employer/Respondent

On 1/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0320 LANNON LANNON & BARR LTD
PATRICIA LANNON KUS
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
COLLEEN McMANIGAL
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

☐	Injured Workers' Benefit Fund (§4(d))
☐	Rate Adjustment Fund (§8(g)
☐	Second Injury Fund (§8(e)18)
☒	None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

14IWCC0354

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

KENNETH JOHNSON
Employee/Petitioner

Case #10 WC 6809

v.

YELLOW ROADWAY CORPORATION
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on January 18, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☒ Should penalties or fees be imposed upon the respondent?

FINDINGS

- After a hearing on July 27, 2010, a Section 19(b) decision was filed on September 2, 2010, finding an accident that arose out of and in the course of the petitioner's employment with the respondent, medical benefits of $8,652.00 due the petitioner and a temporary total disability period from February 18, 2010, through July 27, 2010.
- A Decision and Opinion on Review was rendered on January 5, 2012, essentially affirming and adopting the decision of the arbitrator.
- The parties agreed that the respondent paid $21,469.23 in temporary total disability benefits.
- The parties agreed that the respondent paid all the related medical services provided to the petitioner.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $543.24/week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, which is the period of temporary total disability for which compensation is payable. The petitioner's request for temporary total disability benefits after October 24, 2010, is denied.
- The petitioner's request for medical benefits after December 3, 2010, is denied.
- The petitioner's request for penalties and fees is denied.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert E. Williams

Robert Williams

1/23/13

Date

JAN 24 2013

FINDINGS OF FACTS:

The petitioner received lumbar transforaminal epidural steroid injections at L4 at the Pain Treatment Centers on August 4 and 20, 2010, with a reported 50% relief for the earlier one and 40% relief for the last one. He saw Dr. Cary Templin on August 13th, who opined that the petitioner had an L4-5 far lateral disc herniation impinging the L4 nerve root with pain over his back and right leg. Physical therapy was started. On September 10th, Dr. Templin noted reluctance regarding performing an L4-5 excision since the petitioner's bilateral, mechanical low back pain was not concordant with a right L4 radiculopathy and he had no significant relief with the last two epidural injections. Right L4/5 and L5/S1 facet joint injections were given to the petitioner on September 23rd. The petitioner reported significant improved leg pain on October 21st but significant low back pain. He wanted to return to work to which the doctor complied. On December 3, 2010, the petitioner reported low back pain, some mild right leg pain but doing well overall.

The petitioner returned to Dr. Templin on January 31, 2012, for low back pain without any radiation. The doctor noted a heel-toe gait, 5/5 motor strength, a negative straight leg raise, flexion 70, extension 10 and minimal tenderness to palpation over his back. Dr. Faris Abushariff opined that a lumbar discogram on March 1st was strongly concordant for the petitioner's daily pain at L5-S1. Dr. Templin recommended a transforaminal interbody fusion from L4-5 through L5-S1 on April 20th. On September 10, 2010, Dr. Templin noted that the petitioner had three injections at the L4 nerve root without any benefit from the last two. On December 17, 2012, Dr. Templin performed an L4-5 and L5-S1 posterior and transforaminal lumbar interbody fusion. On January 17, 2013, Dr. Templin continued the petitioner's off-work status.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that his current condition of ill-being with his lumbar spine is causally related to the work injury on February 17, 2010. The petitioner sustained a temporary aggravation of his pre-existing lumbar spine condition on February 17, 2010.

The petitioner had two lumbar spine injuries in 2006 and received treatment with Dr. Malek. On May 8, 2006, Dr. Malek opined that an MRI on April 28, 2006, showed desiccation at L4-5 and L5-S1, a foraminal disc herniation at L4-5 and an annular tear on the left at L5-S1. An MRI on February 19, 2007, revealed a disc bulge at L3-4, a right paracentral disc protrusion, bulge, endplate spurring, facet arthritis and asymmetric right neural foraminal stenosis at L4-5 and a left paracentral disc protrusion, endplate spurring, facet arthritis and mild left neural foraminal stenosis at L5-S1. Dr. Malek's opinion was that the MRI revealed foraminal disc narrowing, annular tears and protrusions on the right at L4-5 and on the left at L5-S1. He recommended a lumbar fusion from L4 through S1 on April 30, 2007, however, the petitioner wanted to delay surgery to a later date.

An MRI on March 1, 2010, showed facet arthrosis, disc bulging and a right-sided foraminal protrusion at L4-5 with mass effect on the right L4 nerve root and facet arthrosis, disc bulging and mild foraminal degenerative narrowing at L5-S1. Dr. Malek opined on March 10, 2010, that the MRI showed desiccation at L4-5 and L5-S1, a right-sided foraminal disc herniation at L4-5 and an annular tear on the left at L5-S1.

On June 14, 2012, Dr. Ghanayem opined that based on a structural or symptom basis the petitioner's back problem did not change after his injury on February 17, 2010, and that the nature of the surgery currently required is the same required in 2007. He

noted on September 28, 2012, that all the MRI studies were identical and there has been no structural change to the petitioner's lumbar spine.

Moreover, the petitioner stopped using pain medication by April 2010, returned to full-duty work on October 25, 2010, and ceased medical care with Dr. Templin on December 3, 2010. The opinion of Dr. Templin is conjecture. The petitioner's request for temporary total disability benefits after October 24, 2010, and medical benefits after December 3, 2010, is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The respondent shall pay the petitioner temporary total disability benefits of $543.24/week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The petitioner's request for temporary total disability benefits after October 24, 2010, is denied.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Dryden,
Petitioner,

vs.

NO: 11WC 16994

14IWCC0355

Centralia Correctional Center,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical (incurred and prospective), temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 14, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAY 15 2014

Daniel R. Donohoo

Ruth W. White

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CJD/jrc
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DEVRIENDT DISSENT

I respectfully dissent from my fellow Commissioners and would reverse the Arbitrator's decision and find that Petitioner has proven that he sustained accidental injuries arising from the course and scope of his employment with the Respondent.

Petitioner testified and the Duty Roster (Respondent Exhibit 3) supports that he worked the Segregation Unit 1-2 times a week from October of 2010 through January 2011. While working the segregation unit he gets a rubber mallet and raps the bars on the three shower stalls. There are 4 bars that run perpendicular and 2 metal bars that run horizontal per shower stall. He must do this twice a day. (Transcript Pgs. 15-16) He then goes and checks each cell, and ask whether the inmates want a shower or go in the yard. If they want a shower, he opens the chuck hole and hand cuffs both inmates from behind. He uses the Folger key to open the chuckhole. He will then take them to the shower, removes the cuffs and allow them to shower. While they are showering, they lock the padlock on the shower and then unlock when they are finished. They would then reverse the process when the inmates get out of the shower. (Transcript Pgs.19-21)

When Petitioner would feed the inmates in the Segregation Unit, he would have to open the chuckholes on 30 cells and give the inmates trays of food. They would then close the chuckholes and come back in twenty minutes and open the chuckholes, remove the trays and close the chuckholes. (Transcript Pgs. 26-27)

Every day inmates from the Segregation unit may request doctor or dental care and would be placed in waist chains or leg iron before leaving the Segregation unit. (Transcript Pgs.26-27)

When he is not working the Segregation Unit, he is working the various wings of the prison. He has to make sure the cell doors are secured which results in a jarring motion to his wrists. He has to walk the wings every half hour and look in on each cell. When you get to the end of the wing there is a padlock. He has to unlock the padlock, take out the logbook, write on it and padlock it back in. He does that every half hour for all four wings. (Transcript Pgs. 30-36)

When he operates out of the control room, every time an inmate leaves to go to the house, he has to press a button to let them out of the wing. Sometimes he is requested to do a shakedown of a cell. Sometimes they will do a shakedown if they suspect there is something in the cell. These shakedowns consist of going through the inmate's property or anywhere they think he may be hiding something. (Transcript Pgs. 39-41)

Petitioner reviewed Corvel's Job Analysis (Respondent Exhibit 1) and criticized it for not mentioning the cuffing and uncuffing when it comes to wrist movement. It also does not mention the chuckholes or the inventory of property boxes and their effect on wrist movement. It did not mention the Petitioner's constant sliding of the prison doors. (Transcript Pg. 42)

Petitioner also reviewed the Corvel DVD of his job prepared on January 28, 2011, and pointed out that, they did not show the compliance checks or how many times they cuff the

inmates in the Segregation unit. It did not show the bar rapping or anything the writ officers do. It did not show anybody securing doors with a forcible push or pull and it did not show the inventory of the property boxes. Finally, the DVD did not show the weapons training and firing that he has to go through every year. (Transcript Pgs. 55-56)

Dr. Kosit Prieb gave his evidence deposition on January 26, 2012. He is a hand and vascular surgeon and is board certified in general surgery. He testified that turning a key and twisting the wrist could have an effect on carpal tunnel syndrome if done repeatedly. Pulling a door and shutting it to make sure, it is locked if done repetitively can cause or aggravate carpal tunnel syndrome. If Petitioner performed these tasks multiple times during the day and his symptoms get worse than based on a reasonable degree of medical certainty, it can aggravate the development of carpal tunnel syndrome. (Petitioner Exhibit 2 Pgs. 11-13)

Petitioner advised him that he opens 150 doors per day and restrains inmates and his hands get numb doing so. Based on a reasonable degree of medical certainty his job duties were a contributory cause of the aggravation and development of his carpal tunnel syndrome. (Petitioner Exhibit 2 Pg. 14)

In Sisbro, Inc. v Industrial Commission 207 Ill. 2d 193; 797 N.E.2d 665; 278 Ill. Dec. 70 (2003) the Supreme Court of Illinois held that it is axiomatic that employers take their employees as they find them. "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." General Electric Co. v. Industrial Comm'n, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. Caterpillar Tractor Co. v. Industrial Comm'n, 92 Ill. 2d at 36; Williams v. Industrial Comm'n, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); County of Cook v. Industrial Comm'n, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977); Town of Cicero v. Industrial Comm'n, 404 Ill. 487, 89 N.E.2d 354 (1949) (It is a well-settled rule that where an employee, in the performance of his duties and as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Rock Road Construction Co. v. Industrial Comm'n, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

The Petitioner's credible testimony, as well as Dr. Prieb's medical opinions, has sustained the Petitioner burden of proof that the activities he performed for the Respondent was a causative factor in the Petitioner's bi-lateral carpal tunnel syndrome.

The Arbitrator's decision should be reversed.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DRYDEN, BRIAN
Employee/Petitioner

Case# **11WC016994**

14IWCC0355

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

On 3/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4535 DENNIS ATTEBERRY
220 W MAIN CROSS
TAYLORVILLE, IL 62568

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAR 14 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS 14IWCC0355

)SS.

COUNTY OF JEFFERSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN DRYDEN
Employee/Petitioner

v.

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

Case # 11 WC 16994

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **2/14/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On **3/21/11**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$56,329.00**; the average weekly wage was **$1,083.25**.

On the date of accident, Petitioner was **48** years of age, *married* with **2** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$All Medical Paid** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident.

Claim is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/1/13
Date

MAR 14 2013

Findings of Fact

Petitioner is a correctional officer at Centralia Correctional Center who reported carpal tunnel symptoms to Dr. Kosit Prieb, on March 21, 2011. Petitioner has been employed by Centralia Correctional Center since 1997; however, he is a reservist who has been deployed frequently throughout that time, most significantly for the 6 years between 2003 and 2009. Petitioner testified that when he mustered out of the military in October 2009, he experienced absolutely no upper extremity complaints. Petitioner testified that he believes his upper extremity complaints developed as a result of this work at Centralia Correctional Center during the five months between October 2009 and March of 2010.

Petitioner worked at a variety of positions on the 7 am to 3 pm shift between October 2009 and March of 2010 including segregation, control room, healthcare, and dayroom. Each of these positions have different duties which involve different upper extremity motions. As a segregation officer, Petitioner manipulated large folger-adams keys weighing approximately one pound, standard sized door keys, small cuff keys, and padlock keys. The majority of his key manipulation in segregation occurs between 8 am and 11:30 am. The segregation unit at Centralia Correctional Center only contains about 30 cells and the duties are divided amongst two correctional officers during the day shift. Petitioner worked in segregation approximately 24 shifts during the period five months he claims to have developed upper extremity complaints. He also worked as a control room officer during which time he would be required to operate a control panel with buttons, switches, and a telephone. He also worked as a dayroom officer during which time he was required to perform wing checks, inspect cells, and check property boxes for contraband. Petitioner continued to work full duty at Centralia Correctional Center with the exception of two brief periods in 2011. His assignment history reveals that he has continued to work in a variety of positions between his onset of symptoms and the present time.

A Job Analysis report for the position of correctional officer at Centralia Correctional Center was prepared by Corvel in January of 2011. (Rx 1) The report indicated that Centralia Correctional Center is a Level 4 medium security facility at which the inmates use their own keys to let themselves in and out of their cells as they go to the yard, gym, school, to meals, the day room, etc. (Id) It further indicates that all the inmates are locked in their cells at approximately 9:30 pm by officers working the 3 pm to 11 pm shift and are not unlocked until approximately 4:30 am by escort officers working the 11 pm to 7 am shift. (Id)

Petitioner initially reported his condition to Dr. Prieb on March 21, 2011. (Px 1) Dr. Prieb's first note indicates that Petitioner experienced numbness and tingling in his upper extremities over the course of the previous year. On March 21, 2011, Petitioner underwent electrodiagnostic testing performed by Dr. Prieb which indicated mildly delayed median sensory latency in the left and right wrist. (Px 1, 3) Dr. Prieb recommended bilateral carpal tunnel decompression on April 14, 2011. (Px 1) Petitioner underwent repeat electrodiagnostic testing on July 22, 2011 which was read as being compatible with right sided carpal tunnel syndrome and right cubital tunnel syndrome. (Px 3) Dr. Preib injected Petitioner's wrists with Kenalog on August 29, 2011 and kept him off of work until September 6, 2011. Petitioner reports that the injections provided only minimal temporary relief. (Px 1) The record does not indicate that Petitioner's has received any medical treatment since October 3, 2011. (Px 1)

The deposition of Dr. Prieb was taken on January 26, 2012. (Px 2) During his deposition, Dr. Prieb confirmed his diagnosis of bilateral carpal tunnel syndrome and bilateral medial epicondylitis. (Id at 9) Dr. Prieb further opined that Petitioner's job duties, as he understood them, had caused his upper extremity conditions. (Id at 25) Dr. Prieb testified that Petitioner first manifested upper extremity tingling in approximately March of 2010. (Id at 32-33) Dr. Prieb was unaware of Petitioner's military service. (Id at 32) He testified that all the information

regarding Petitioner's job duties which he received and utilized in the course of his treatment came directly from Petitioner himself. (Id 29-31) Dr. Prieb further admitted that his causation opinion would be stronger if he had toured Centralia Correctional Center and observed the types of activities which Petitioner performed on a daily basis. (Id at 31)

Dr. Anthony Sudekum is a board certified plastic and reconstructive surgeon with an added qualification in surgery of the hand. (Rx 2 p 5-6) Dr. Sudekum has toured Centralia Correctional Center, Big Muddy Correctional Center, and Menard Correctional Center to perform assessments regarding the potential for repetitive trauma injuries at these facilities. (Id at 22, 91) Dr. Sudekum felt that the duties performed by correctional officers at Centralia Correctional Center and Big Muddy Correctional Center were not causative or aggravating factors for conditions such as carpal tunnel syndrome. (Id at 95-98) Dr. Sudekum spent four hours touring Centralia Correctional Center, during which time he was able to turn keys and perform various other duties of a correctional officer including handcuffing, property box manipulation, bar rapping, and control panel use. (Id at 23-31) He specifically referenced visiting dayrooms, control rooms, and segregation. (Id at 41) Dr. Sudekum has also reviewed the Corvel Job Analysis report and DVD as well as job descriptions provided by correctional officers. (Id at 24)

On December 14, 2011, Dr. Sudekum prepared a Section 12 report regarding Petitioner and, based upon his knowledge and expertise, opined to a reasonable degree of medical certainty that Petitioner's duties as a correctional officer at Centralia Correctional Center did not cause or aggravate his alleged carpal tunnel syndrome. (Rx 2 at 33, 36) Dr. Sudekum did not disagree with Dr. Prieb's diagnosis of bilateral carpal tunnel syndrome and medial epicondylitis, however due to the flaws in the electrodiagnostic testing, he felt that the record lacked sufficient objective evidence to support the diagnosis. (Id at 34-35) Dr. Sudekum opined that Petitioner's age and obesity were comorbid factors for the development of carpal tunnel syndrome. (Id at 37-39)

Based on the foregoing, the Arbitrator makes the following conclusions:

1. Petitioner failed to meet his burden of proof regarding the issue of accident. The Arbitrator notes that the Petitioner's job duties were varied throughout the day and were not sufficiently repetitive to rise to the level of an accident. The Arbitrator also finds the opinions of Dr. Sudekum more persuasive than Dr. Prieb on this issue in that he had a better understanding of the Petitioner's job activities and the physical force required to perform these activities. Even Dr. Prieb admitted that his opinions would be stronger if he had the information obtained by Dr. Sudekum. Petitioner's own testimony was that he believed his carpal tunnel syndrome developed some time between October, 2009 and March, 2010 – which casts further doubt that an accident occurred on the date he alleges. Based on all these factors, the Arbitrator finds the Petitioner did not prove he sustained an accident on March 21, 2011.

2. Based on the Arbitrator's findings regarding accident, all other issues are rendered moot and the Petitioner's claim is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal Connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Kaiser,

Petitioner,

vs.

NO: 09 WC 38315

14IWCC0356

Elmhurst Memorial Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and prospective medical treatment and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and denies Petitioner's claim for benefits under §19(b) and 8(a) of the Act. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 34-year-old nurse, filed an Application for Adjustment of Claim alleging injuries to her right knee on April 10, 2009. She sustained an undisputed accidental injury while assisting a patient, catching her right foot underneath a bed and twisting her right knee. Petitioner had a recent history of two prior right knee surgeries, but testified that she was working full duty, had no symptoms, and maintained a physically active lifestyle prior to the date of accident. (T. 10-11) Following the accident, Petitioner underwent three right knee surgeries on an authorized basis. On July 22, 2009, Dr. Romano performed an arthroscopic medial femoral chondroplasty with microfracture. (RX 5) On January 5, 2010, Dr. Cole performed an osteochondral allograft. (PX 3) On June 1, 2010, Dr. Cole performed an arthroscopic medal meniscectomy, right knee synovectomy and suprapatellar pouch release. (PX 3) On September 20, 2010, Dr. Cole released

Petitioner at maximum medical improvement from an orthopedic standpoint but indicated that Petitioner could benefit from pain management treatment. Petitioner was diagnosed with complex regional pain syndrome (CRPS) in her right lower extremity by Dr. Amin and underwent several series of sympathetic blocks with little to no improvement. Most recently, Dr. Amin recommended a six week epidural infusion wherein a catheter is placed in the spinal column and medication is constantly administered to calm the nerves to the right leg. (PX 2) Respondent denied authorization for the epidural infusion, relying on the opinions of Dr. Ingberman.

Dr. Ingberman examined Petitioner pursuant to §12 on three occasions and testified via deposition that she did not agree with the CRPS diagnosis and she opined that Petitioner's current condition of ill-being, chronic pain, is not causally connected to the April 10, 2009 accident. Furthermore, Dr. Ingberman opined that Petitioner is not a candidate for invasive treatments such as the epidural infusions or a spinal cord stimulator. (RX 1)

In a Decision dated July 2, 2013, the Arbitrator found that Petitioner's current condition of ill-being (CRPS) is causally related to the accident. The Arbitrator awarded temporary total disability benefits from February 3, 2013 through May 15, 2013 and the prospective medical treatment recommended by Dr. Amin for CRPS. However, the Arbitrator also ordered Petitioner to undergo psychological testing performed at the direction of Dr. Amin prior to any additional treatment.

The Arbitrator found Dr. Ingberman's opinion that Petitioner does not actually have CRPS and is not a good candidate for further invasive treatments to be "fairly compelling." The Arbitrator noted he personally observed no signs of CRPS (abnormal coloration, hair growth or perspiration) during his examination of Petitioner at Arbitration. Nevertheless, the Arbitrator concluded that Dr. Amin's diagnosis and treatment plan is reliable, reasonable and necessary and related to the accident of April 10, 2009. The Arbitrator found that Dr. Amin's overall treatment plan is "well grounded and credible" and that Petitioner's symptoms of CRPS are documented if subjective. The Arbitrator found that the six-week course of treatment proposed by Dr. Amin is reasonably necessary. Dr. Amin testified that the epidural infusions are part of a recognized course of pain management treatment for patients with CRPS. (PX 2)

Respondent argues on review that the Arbitrator erred in awarding the prospective medical treatment and in awarding any temporary total disability benefits because Petitioner failed to prove the medical treatment is necessary and related to the April 10, 2009 accident. Dr. Amin never specifically provided a causation opinion and the evidence does not prove an unbroken chain of causation between the accident and Petitioner's current condition of ill-being. Dr. Ingberman testified that Petitioner is the type of chronic pain patient who would most likely continue to seek treatment indefinitely without subjective improvement. (RX 1) It is apparent from the testimony of Dr. Amin and Dr. Ingberman that both doctors are cognizant of the probable psychological component of Petitioner's chronic pain condition. A utilization review non-certified the epidural infusions partly on the basis that Petitioner's chronic pain condition

had not been evaluated from a psychological versus physical perspective. (RX 4) Dr. Ingberman testified that she agreed with the decision of the utilization review. (RX 1) The Arbitrator's order for a psychological evaluation prior to the epidural infusion treatment is a compromise between differing medical opinions.

After considering all of the evidence, we find that Petitioner failed to prove that her current condition of ill-being after September 10, 2010 is causally related to the accident of April 10, 2009 and we remand this case to the Arbitrator for further proceedings consistent with this decision. On September 2, 2010, Dr. Cole discharged Petitioner at maximum medical improvement from an orthopedic standpoint. Dr. Cole issued permanent restrictions of limited standing and no lifting greater than ten pounds but added "Please note there could be some "lightening" of these restrictions if and when she attains some clinical improvement through her care with Dr. Amin. I expect and hope that this well be the case. I would love to see her improve in her clinical capacity, as what is going on now is out of my scope of practice and is dealing with greater issues than knee cartilage." (PX 3) Petitioner testified that she could not return to work for Respondent with permanent restrictions, but that within one week she started a new job at Sedgwick CMS performing telephonic case management for workers' compensation claims. (T. 21-22) Petitioner worked full time and did not return to Dr. Amin or seek any medical treatment for one year following her release from Dr. Cole. Petitioner continued working full time for two years until she voluntarily terminated her employment on September 12, 2012. In conclusion, based on Dr. Cole's release followed by a significant gap in treatment and a successful return to work for two years, several inconsistencies in the records with respect to Petitioner's complaints and presentation, and insufficient evidence that after September 10, 2010 Petitioner was still suffering from the effects of the April 10, 2009 accident and was not merely malingering or suffering from a psychological condition, we cannot endorse the recommended invasive treatment for this Petitioner and accordingly we deny Petitioner's claim for benefits under §19(b) and 8(a).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2013 is hereby reversed and the Arbitrator's award of prospective medical benefits and temporary total disability after September 10, 2010 is vacated and this case is remanded to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 15 2014
RWW/plv
o-2/19/14
46

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
& 8(A)

KAISER, JENNIFER
Employee/Petitioner

Case# **09WC038315**

14IWCC0356

ELMHURST MEMORIAL HOSPITAL
Employer/Respondent

On 7/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

0544 LOSS & PAVONE PC
JOSEPH LOSS
1920 S HIGHLAND AVE SUITE 203
LOMBARD, IL 60148

14IWCC0356

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B) & 8(A) DECISION

JENNIFER KAISER
Employee/Petitioner

v.

ELMHURST MEMORIAL HOSPITAL
Employer/Respondent

Case # 09 WC 038315

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago** , on **04-15-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Prospective medical under 8(a)**

FINDINGS

On **April 13, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**46,799.37**; the average weekly wage was $**900.00**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **no** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **22,628.49** for TTD, $ **2,498.98** for TPD, $**0** for maintenance, and $ **11,610 for PPD advance,** for a total credit of $ **36,737.47.**.

ORDER:

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 600.00 / week for 10.286 weeks, commencing 02-03-13 to 04-15-13.

Causal Connection

Petitioner has proved a causal connection between her current condition of CRPS and her injury on April 13, 2009.

Medical Benefits

Respondent shall be given a credit for reasonable and necessary medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers for the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical benefits of **$ 12,705.35** as provided in Section 8(a) of the Act.

The Petitioner is entitled to prospective medical treatment as prescribed Dr. Amin as her condition of ill being has not reached a permanent state. However, the Arbitrator finds that Petitioner should have documented psychological testing performed at his direction prior to the above treatment

THE ATTACHED STATEMENT OF FACTS AND CONCLUSIONS OF LAW ARE INCORPORATED HEREIN.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

07.03.13
Date

JUL 2 - 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION OF ILLINOIS

ARBITRATION DECISION

State of Illinois)
)ss
County of DuPage)

14IWCC0356

JENNIFER KAISER
Petitioner

vs.

ELMHURST MEMORIAL HOSPITAL
Respondent

09 WC 038315

STATEMENT OF FACTS

The Petitioner is a 37 year old woman who reported injuring her right knee on April 13, 2009 while working as a cardiovascular nurse at Elmhurst Memorial Hospital. She was moving a patient on a bed and caught her right foot underneath the bed, twisting her leg, and reinjured her knee.

The Petitioner has a history of two previous anterior cruciate ligament repairs to the same knee as well as an ACL reconstruction with a patellar tendon autograft which failed and revision ACL reconstruction with an allograft.

She was initially seen by Dr. Sheehan, an orthopedic surgeon at Elmhurst Clinic on the same day of the accident. X-rays showed mild degenerative changes without acute osseous abnormality. Dr. Sheehan recommended conservative treatment with a diagnosis of a right knee sprain.

An MRI was performed on April 15, 2009 which showed a post ACL repair and no obvious complications or acute changes. She was dispensed with a right knee brace.

The Petitioner then came under the care of Dr. Romano on June 4, 2009. She had

continued complaints of right knee pain and an arthroscopic excision of a plica with possible chondroplasty was recommended.

On July 22, 2009, an arthroscopic medial femoral chondroplasty with microfracture was done by Dr. Romano. She followed with a course of physical therapy and continued complaints of pain, popping, and crepitus which was reported as being due to post operative swelling. She was recommended Celebrex and partial weight bearing for two weeks progressing to full weight bearing.

She saw Dr. Romano again on September 10, 2009 reporting that she was feeling a little bit better and was recommended to continue physical therapy along with a hinge brace and a patella knee sleeve.

She sought the treatment of Dr. Troy Karlsson on October 5, 2009. Dr. Karlsson did not recommend surgery. The Petitioner sought a second opinion with Dr. Bush-Joseph at Rush University Medical Center.

On October 27, 2009, Dr. Bush-Joseph, referred her to Dr. Brian Cole for a surgical consultation with possible cartilage restoration. On November 30, 2009, Dr. Cole diagnosed a right knee medial condyle defect and recommended osteochondral allograft which was performed on January 5, 2010. The Petitioner was nonweightbearing for the four weeks she was on crutches. The Petitioner was released to sedentary duty work and was prescribed physical therapy.

On March 18, 2010, Dr. Cole reported that she was still experiencing pain in the medial aspect of the knee after five minutes of weightbearing. He recommended more physical therapy. The Petitioner was working a desk job for the Respondent.

On April 22, 2010, she reported popping and clicking in the right knee. Dr. Cole recommended a follow up MRI. A follow up MRI showed a small focal bone marrow edema and small effusion anterior to the graft. Dr. Cole recommended an arthroscopic procedure for suspected plica and possible foreign body with anticipated return to work one week after surgery.

On June 1, 2010, Dr. Cole performed the second surgery of the right knee. The plica and a small meniscal tear were excised. Dr. Cole noted at that time that she had residual mild ACL laxity. He recommended additional strengthening and physical therapy.

Petitioner saw Dr. Cole's physician assistant, Mr. Pilz, and told him she had gone fishing on June 7, 2010 and was climbing up a hill. (Pt's Ex. 3). Art Petitioner's request, Pilz wrote specific restrictions of sedentary level with limited standing and walking.

On July 8, 2010, Dr. Cole noted complaints of continued pain with activities, especially in the antrolateral aspect of the patella, but no pain with sitting or resting. She reported hypersensitivity at the lateral aspect of the knee, complaining she began to feel this one week

after surgery but didn't mention it until six months post operatively. Dr. Cole gave a depo-medrol injection into her knee with a recommendation for additional physical therapy and a patella sleeve to support her ACL.

On July 28, 2010, a physical therapist noted swelling in her knee and it was painful to touch due to a possible meniscal tear. Later, she plateaued in therapy and was discharged from it on August 12, 2010. Nevertheless, Petitioner reported persistent pain and hypersensitivity in the lateral aspect of the right knee. Dr. Cole started her on Lyrica and referred her to Dr. Sandeep Amin, a pain management specialist at Rush University Medical Center for evaluation and treatment and possible early Complex Regional Pain Syndrome. (CRPS)

Petitioner was working four hours a day as a light duty nurse at that time. Dr. Amin diagnosed her with neuropathic pain, but did not think she had CRPS. This was on August 23, 2010.

An EMG performed on September 1, 2010 was normal.

Petitioner was discharged by Dr. Cole on September 2, 2010. At that time, the Petitioner was at MMI from an orthopedic standpoint and had permanent restrictions of limited standing and no lifting greater than 10 pounds.

On September 2, 2010, she underwent a sympathetic block by Dr. Amin and reported 50% improvement to her pain level.

The Petitioner started a new job working for Sedgwick CMS on October 4, 2010 as a nurse case manager/pharmacy nurse.

Subsequently, there was an 11 month gap in treatment.

Petitioner did not see Dr. Amin again until September 12, 2011, where she reported three months of relief from the lumbar sympathetic nerve block but had burning pain in the right foot for the last three weeks. Dr. Amin noted mild erythema and moderate diffuse allodynia of the right foot. She also had allodynia in the lateral aspect of the right knee. Dr. Amin recommended a series of lumbar sympathetic blocks and diagnosed a flare up of right foot neuropathic pain.

On September 15, 2011, x-rays showed a stable graft and no demonstrable change in temperature or skin color of the Petitioner's right knee and leg. Nevertheless, the record reflects that Petitioner underwent a series of three injections by Dr. Amin in the autumn of 2011. By October 25, 2011, Dr. Amin's diagnosis had changed to "CRPS and neuropathic pain of the right lower extremity."

Again, there was a six month treatment gap.

On April 23, 2012, the Petitioner returned to Dr. Amin with renewed complaints.

On May 2, 2012, Dr. Amin administered another lumbar sympathetic block. She testified that she felt relief for about two weeks.

Since this treatment was not long lasting, Dr. Amin has prescribed a 6-week epidural infusion. An external pump provides narcotic medication to the Petitioner's lumbar spinal via a catheter which is inserted into an epidural space via x-ray guidance. The portable morphine pump is worn for six weeks.

The above treatment has been denied by Respondent and is the crux of the 8(a) portion of this claim.

The Petitioner continues to treat intermittently with Dr. Amin for pain management.

On April 26, 2012, an MRI of the lumbar spine revealed minimal degenerative changes. The record reflects the Petitioner sought no treatment from November 14, 2011 until April 23, 2012.

On June 4, 2012, the Petitioner was seen by Dr. Ingberman, who is Board Certified in Physical Medicine and Rehabilitation and Pain Medicine. When she examined the Petitioner, the doctor saw no evidence of CRPS. However, mild right knee instability was documented, along with chronic right lower extremity pain that was neuropathic in quality. The prognosis for functional recovery was good. Dr. Ingberman recommended completing one more series of sympathetic blocks followed by an interdisciplinary four weeks pain management program, following which she would be at MMI. Dr. Ingberman noted specifically that the Petitioner should not have additional blocks in the future, but that she should continue an independent exercise program. Dr. Ingberman further found that there was no reason why the Petitioner could not continue to work in her sedentary capacity as a pharmacy nurse at Sedgwick CMS. Dr. Ingberman felt that the Petitioner's symptoms on that date were partially related to the injury and also related to underlying present and past psychological issues.

She was seen again by Dr. Ingberman on October 9, 2012, who noted on that date that the Petitioner reported that she used to regularly do desensitization exercises of her foot which had helped her significantly. The Petitioner stated that she had stopped that many months ago. Dr. Ingberman conducted a physical examination on October 9, 2012 and noted "There is no difference in hair growth, color of the skin or perspiration in bilateral lower extremities. The right foot appears to be slightly cooler on palpation compared to the left," which she opined was a normal finding.

Dr. Ingberman stated that she did not recommend any further treatment for the Petitioner. She found the Petitioner was at MMI and should resume her independent exercises and desensitization. She specifically recommended against the treatment proposed by Dr. Amin.

The Petitioner testified at trial that she smokes marijuana on a daily basis.

The Doctor further noted that the Petitioner has been experiencing psoriatic arthritis involving multiple joints for many years. The Petitioner reported that during flare ups of the arthritic pain, she experienced 5 to 8 out of 10 in her joints. She had been under the care of a rheumatologist. Dr. Ingberman found further that the Petitioner should be able to work in a sedentary capacity at that time.

The Petitioner was seen again by Dr. Ingberman on November 28, 2012. The Petitioner expressed her anger at Dr. Ingberman for her recommendation for no additional treatment. Dr. Ingberman once again found that the Petitioner's painful condition did not meet Budapest's criteria for a diagnosis of CRPS. In addition, she found that the Petitioner has significant psychological factors that make any interventional procedures carry a higher risk of failure and complications. She again found no reason that the Petitioner could not continue to work in a sedentary capacity.

ISSUES

F. Is Petitioner's Current Condition of Ill-Being Causally Related To the Injury?

J. Were The Medical Services That Were Provided To Petitioner Reasonable And Necessary? Has Respondent Paid All Appropriate Charges For All Reasonable And Necessary Medical Services?

K. What Temporary Benefits Are In Dispute?

CONCLUSIONS OF LAW

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that the Petitioner's current condition of ill-being, in particular CRPS, is causally related to the accident of April 13, 2009.

In finding the above, the Arbitrator notes the following:

The Arbitrator finds the opinion of Dr. Ingberman to be fairly compelling. To review, she found no objective evidence of CRPS and, in fact, the Petitioner's pain complaints did not meet the standard for the Budapest criteria in diagnosing CRPS. The Budapest criteria were designed for better diagnosis of CRPS by the International Association for the Study of Pain. (R's Ex. 1, Deposition transcript of Dr. Ingberman, page 56.)

In addition, Dr. Ingberman testified that the Petitioner reported doing desensitization exercises for her foot that she learned from a physical therapist but that she had stopped doing them. "She reported that she found that when she was doing the exercises, they were very helpful, but she stopped doing them for whatever, so that is noncompliance on her part and that was against what was recommended." (Ibid. p. 36).

The Arbitrator notes the significant gap in treatment from September 2, 2010 when last seen by Dr. Cole and her returning for treatment with Dr. Amin on August 26, 2011. The Petitioner was working a full-time sedentary job during this approximate 11 month gap in treatment. The Arbitrator further notes an additional five month gap in treatment from November 14, 2011 to April 23, 2012.

Further, Dr. Ingberman testified that the Petitioner's psychological history would make her a poor candidate for prolonged and invasive pain management. (Ibid. p. 34).

Dr. Ingberman testified that the Petitioner "had the personality profile which would cause her to seek treatment and find treaters and she would maybe find temporary relief but then would go on and have another and ask for another treatment and another treatment but that the Petitioner would neglect to do the most basic things that would really help her to improve quality of life and avoid ongoing harmful interventions." (Ibid. p. 35)

The Arbitrator had an opportunity observe the injured knee. The Arbitrator found no evidence of discoloration about the knee, however, there was significant discoloration due to psoriasis. In addition, the Arbitrator found no abnormal hair growth or abnormal perspiration.

The Arbitrator notes that the Petitioner was discharged by Dr. Cole at MMI on September 3, 2010 followed by an 11 month gap in treatment until August 26, 2011, during which Petitioner worked full time.

Despite the above, the Arbitrator finds the Petitioner's current condition of ill-being is causally related to her work injury of April 13, 2009.

If looking at the entire medical record, it appear to the Arbitrator that Dr. Amin's overall treatment plan is well grounded and credible. The symptoms of CRPS are documented, but mostly subjective. Initial treatment for "neuropatic pain" was diagnosed by Dr. Ingberman and approved by Respondent. The Arbitrator notes that a neuropathic pain of unknown etiology is also largely based on subjective complaints.

Dr. Ingberman is concerned about a future scenario where there is perpetual treatment by multiple doctors with astronomical bills and never-ending complaints. However, this case does not appear fit that profile. The Petitioner has not been doctor shopping. The treatment proposed is a six week program and the bills do not seem outrageous. Additionally, the Arbitrator notes there have been no reports of symptom magnification by any treater or physical therapist thus

far. There is some concern about narcotic addiction, but that is true in any chronic pain case. Finally, Dr. Bryan Cole enjoys a reputation as a high quality treater, who referred the Petitioner to Dr. Amin; the Petitioner has not been treating with storefront physicians.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Respondent introduced into evidence the Utilization Review report of Dr. Steven Blum, who is certified by the American Board of Anesthesiology with a Sub-certification in pain medicine. Dr. Blum performed a medical record review and UR at the request of Triune Health Group. (R's Ex.4.) The UR noncertified Dr. Amin's recommendation for a six-week epidural pain pump and noncertified a spinal cord stimulator, Flexor patch, and physical therapy.

In addition, partial certification was given for therapy for dates of July 27, 2009 to August 6, 2009, January 25, 2010 to February 1, 2010, and June 15, 2010 to July 29, 2010. All other physical therapy visits were noncertified.

The noncertification was based on the fact that the epidural/pain pump is an implantable drug delivery system and is recommended only as an end stage treatment alternative for selected patients for specific conditions. Dr. Blum reviewed the treating records and found that the Petitioner was not a good candidate for the epidural pain pump or spinal cord stimulator (SCS). He opined that psychological evaluation should be obtained and the evaluation should state that the pain is not primarily psychological in origin and that benefit would occur with implantation despite any psychiatric co-morbidity. Dr. Blum was not subject to cross-examination.

Dr. Blum found there was no psychological evaluation report which indicates that the Patient's claim is not primarily psychological in origin and further opined that ODG recommends psychological screening prior to all SCS implantations. There is no indication that Petitioner had obtained documented psychological clearance before proceeding with the SCS trial. Dr. Ingberman, noted Petitioner's psychological issues.

The Petitioner testified that she has been dealing with anger issues and anxiety issues since childhood. She stated that she was molested as a child, and has had professional help in this area. This was pointed out by Dr. Ingberman in her deposition testimony. (R's Ex. 1, pp 34,35).

Petitioner's treater, Dr. Amin, testified on cross-examination that the Petitioner was seen by a pain psychologist but he did not recall any conversation specifically with the psychologist. His treating notes did not contain any comment or notes from the psychologist nor could he remember any specific date, time, or substance of any conversation with this purported visit with a psychologist. He did state that pre-existing psychological conditions can be aggravated by

chronic-pain. (Pt's Ex. 2, Amin Dep., pp-51,52, 53.)

As a result of the above, the Arbitrator finds Petitioner entitled to a psychological evaluation prior to the treatment prescribed by Dr. Amin.

Additionally, the outstanding medical bills in the amount of $12,705.35 are awarded. (PX #1).

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The parties stipulated that the Petitioner was paid Temporary Total Disability (TTD) benefits from July 22, 2009 to December 15, 2009; December 27, 2009 to February 6, 2010; June 1, 2010 to July 10, 2010; and August 30, 2010 to October 3, 2010. This is a total 70 3/7 weeks.

The parties also stipulated that Respondent paid TPD benefits from December 13, 2009 to December 26, 2009, February 7, 2010 to March 22, 2010; April 18, 2010 to June 12, 2010, July 25, 2010 to August 7, 2010. This is a total of 19 5/7 weeks.

Petitioner testified that during the period of time she was paid TPD benefits, she was performing a light duty job for the Respondent, Elmhurst Memorial Hospital. During this period of time, Respondent provided vocational rehabilitation services, but before the actual start of a job search after a vocational assessment, Petitioner found a job on her own with Sedgwick CMS, a workers' compensation administrative provider and third party administrator. She accepted a position as a pharmacy nurse and began work on October 4, 2010. (R's Ex. 2, p.3). This was a sedentary desk job. Petitioner's starting salary with Sedgwick amounted to approximately $21,000.00 more than she had been earning for the Respondent. (R's Ex. 2, pp 11, 23.)

As part of the hiring process, Petitioner was required to fill out a list of previous employers. When asked her reason for leaving her current employer, she responded, "Looking to expand my nursing qualifications. Would like a desk job at this time." (R. Ex 2, p. 26)

Petitioner continued to work in the sedentary capacity until September 12, 2012. On that date, Petitioner terminated her employment with Sedgwick CMS over certain performance issues including violating the dress code. (R's. Ex 2, pp 3, 44). The records reflect that the Petitioner, while discussing remedial action with her supervisor, jumped up and said, "I Quit", and left the employer immediately. She did not finish out the day, but left before 12 noon. (R's Ex. 2, p 44, p. 3.)

The Respondent presented witness Sonya Rose, vocational counselor, who testified that with Petitioner's skills, there were over 200 job openings available which were sedentary and required only desk work. There was no testimony that Petitioner attempted to find sedentary work on her own.

The Arbitrator finds that the Petitioner was capable of performing a sedentary duty position and voluntarily took herself out of the workforce.

For the forgoing reasons, the Arbitrator finds the Petitioner is not entitled to TTD benefits from September 12, 2012 until February 2, 2013.

However, Dr. Amin took the Petitioner off work completely on February 3, 2013, so she was not at MMI from a chronic pain standpoint. The Petitioner is entitled to TTD benefits from February 3, 2013 to April 15, 2013, the date of the 19(b) hearing in Chicago.

07-03-13

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHEILAH GRIFFITH, WIDOW, OF DAVID GRIFFITH
& TABITHA GRIFFITH, INCAPACITATED CHILD,

Petitioners,

vs. NO: 08 WC 56898

14IWCC0357

PEADODY COAL, *ET.AL.*,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, last exposure date, notice, causation, occupational disease, incapacity of the child, and maximum survivor benefit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that the Decedent's occupational disease contributed to his death. He also found that Decedent's adult child was incapacitated. The Commission agrees with those findings and adopts and affirms those aspects of the Decision of the Arbitrator. In addition, in his order, the Arbitrator awarded Decedent's widow, Sheila Griffith $520 a week until $250,000 has been paid or 20 years, whichever is greater.

Section 8(b)4.2 of the Act provides in its entirety: "Any provision to the contrary notwithstanding, the total compensation payable under Section 7 shall not exceed the greater of $500,000 or 25 years." Unlike the maximum permanent partial disability provisions regarding injuries to specific body parts, the maximum death benefit provision does not specify that it applies to injuries accrued on or after a certain date. If it did, the date of accident would apply and the lower maximum would be in effect in this case. However, because the death benefit maximum provision does not specify the accident or injury date as the operative date, the operative date is the date of death. The higher limit went into effect in 2006 and Decedent died in 2008. Therefore, the higher rate applies and the Commission modifies the decision.

14IWCC0357

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay death benefits, commencing March 11, 2008 of $520.00 per week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, Sheila Griffith shall be paid $260.00 in weekly benefits on her own behalf. Sheila Griffith's benefits shall continue until $500,000 has been paid or 25 years, whichever is greater. Tabitha Griffith shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child for the duration of her incapacity.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay compensation that has accrued from March 11, 2008 through the date of this order, and shall pay the remainder of the awarded benefits of the awarded weekly benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that if the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $8,000.00 for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing the second July 15th after the entry of this award, Petitioners may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: MAY 15 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-4/22/14
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRIFFITH, SHEILAH WIDOW OF GRIFFITH, DAVID, GRIFFITH, TABITHA DEPENDENT INCAPACITATED CHILD
Employee/Petitioner

Case# **08WC056898**

14IWCC0357

PEABODY COAL CO ET AL
Employer/Respondent

On 7/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

2742 HAZLETT & SHORT PC
KEVIN M HAZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☒ ~~Rate Adjustment Fund (§8(g))~~
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

14IWCC0357

Sheila Griffith, Widow of David Griffith, Tabitha Griffith, Dependent Incapacitated Child

Employee/Petitioner

v.

Peabody Coal Co., et al.

Employer/Respondent

Case # 08 WC 56898

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the **Honorable Gerald Granada**, Arbitrator of the Commission, in the city of **Collinsville** on **March 25, 2013**. The issue of dependency of Tabitha Griffith was heard on **June 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Decedent's current condition of ill-being causally related to the injury?

G. ☐ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☒ Who was dependent on Decedent at the time of death?

K. ☐ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **causation, death benefits, arising out of and in the course of, disease**

FINDINGS 14IWCC0357

On the date of accident (last exposure), **September 21, 1996**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Decedent and Respondent.

On this date, Decedent *did* sustain an accident/diseases that arose out of and in the course of employment.

Timely notice of the accident/diseases *was* given to Respondent.

Decedent's death *is* causally related to the accident/diseases.

In the year preceding the injury, Decedent earned **$40,560.00**; the average weekly wage was **$780.00.**

On the date of death, Decedent was **60** years of age, ***married,*** with **1** dependent child.

The Arbitrator finds that Decedent died on **March 11, 2008** leaving **two** survivors, as provided in Section 7(a) of the Act, including **his spouse, Sheila Griffith and his daughter Tabitha Griffith**.

ORDER

Respondent shall pay death benefits, commencing **March 11, 2008**, of **$520.00**/week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, ***Sheila Griffith*** shall be paid $260.00 in weekly benefits on her own behalf . Sheila Griffith's benefits shall continue, until ***$250,000 has been paid or 20 years ,*** whichever is greater. ***Tabitha Griffith*** shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child, for the duration of her incapacity.

Respondent shall pay compensation that has accrued from March 11, 2008 through **the date of this order**, and shall pay the remainder of the awarded weekly payments.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall pay ***$8,000.00*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund*** , as provided in Section 8(g) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

7/23/13
Date

JUL 25 2013

FINDINGS OF FACT

On April 4, 2003 the Illinois Industrial Commission (now known as the Illinois Workers Compensation Commission) affirmed and adopted an award for David Griffith finding him totally and permanently disabled as a result of coal workers' pneumoconiosis (CWP), and chronic obstructive pulmonary disease (COPD), including emphysema and chronic bronchitis. The Commission found that Mr. Griffith coal mined for 24 years, last working for the Respondent Peabody Coal Company on September 21, 1996. Drs. Partridge and Houser testified for Mr. Griffith, and Dr. Tuteur testified for Respondent. (Arb. EX 3). The Appellate Court affirmed the Commission's decision. (Arb EX 4). Mr. Griffith died on May 11, 2008, and his death certificate listed lung cancer with metastasis as the immediate cause of death. (PX 3). This matter was tried again with the primary issue being whether the Petitioner's death was causally connected to those conditions, which the Commission previously found causally connected to his employment and from which the Petitioner was permanently and totally disabled.

Sheilah Griffith testified on March 25, 2013. There is no dispute that she was married to the Petitioner, David Griffith through the date of his death on May 11, 2008. She described decedent's oxygen use in the year prior to his death. She also detailed his respiratory struggles, including his breathlessness. During his final days decedent turned blue at times requiring his oxygen to be adjusted. He declined each day until he was unable to go on. He died quietly at home.

After the initial hearing on this matter it was discovered that Petitioner, Sheila Griffith's daughter, might be an incapacitated child entitled to benefits as a dependent. By agreement of the parties, proofs were reopened to consider that issue and the matter was heard on June 20, 2013. At this hearing, Petitioner Sheila Griffith testified that her daughter, Tabitha Griffith, was born with spina bifida and has no sphincter requiring Sheila to carry clothes with her whenever Tabitha leaves the house. Tabitha is unable to leave the home without her mother's assistance and care. Tabitha completed three grades of school and has never worked in any capacity. Dr. Elliot Partridge has been her lifelong physician. Petitioner introduced Dr. Partridge's letter stating "Tabitha is disabled and will continue to be disabled. Tabitha is cared for by her mother Sheila Griffin (sic)." (PX 2, 6-20-13 hearing). Sheila Griffith also testified that Tabitha is receiving Social Security disability benefits, and Petitioner introduced a letter from the Social Security Administration granting SSI benefits based on her disabilty. (PX 1, 6-20-13 hearing). Sheila Griffith testified that since Janauary of 1997 these benefits have continued without review. Sheila Griffith is the recipient of the checks for Tabitha's benefit. Tabitha Griffith testified that she has problems leaving the home because she is unable to control her body from the waist down, making it difficult to walk, and requiring the use of a catheter and the assitance of her mother.

Dr. Houser, a treating pulmonologist, testified via evidence deposition that decedent was referred to his office by his primary care physician, Dr. Partridge on April 16, 1999. Dr. Houser then treated him on numerous occasions. Initially decedent had shortness of breath walking one block and had a chronic cough with about a tablespoon of sputum every 24 hours. He coughed up blood on 2-3 occasions over a six month period. He used an aerosol machine at home and antibiotics and Prednisone for acute exacerbations. Decedent was on Theophylline, Atrovent, Proventil and Azmacort for his breathing. (PX 1, p. 9-10). Dr. Houser discussed decedent's treatment over the years. He was treated by cardiologist Dr. Millsaps since 1996 and later by oncologists, Drs. Domingo and Concepcion. (p. 10). Decedent's pulmonary function testing (PFTs) improved to a mild obstruction, which Dr. Houser attributed to periodic use of antibiotics and Prednisone for chronic bronchitis. His condition changed substantially on March 22, 2007 after his cancer diagnosis. He was not a good surgical candidate due to lung and heart disease, weight loss, and chest and back pain, which usually indicates far advanced disease and chest wall involvement. (p. 13-16).

Dr. Houser felt decedent's lung disease would aggravate his heart disease. (PX 1, p. 17-19). Dr. Houser provided postoperative mortality from surgery is impossible to determine in a person with CWP, COPD, lung cancer, and severe CAD. In this he disagreed with Respondent's IME, Dr. Renn. (p. 20-21). Dr. Houser explained that COPD is a chronic systemic inflammatory syndrome, and COPD patients have an increased incidence of other comorbid conditions, such as cardiac conditions. (PX 1, p. 22-25). Decedent's lung cancer would have caused a multi-organ or multifactorial terminal event, and his lung disease would have played a causative role. Dr. Houser concluded that decedent's COPD, emphysema, CWP, and coronary disease were substantial factors contributing to death. (p. 25-27).

Dr. Elliot O. Partridge also testified via evidence deposition. He began treating decedent around 1984. He stated decedent's pulmonary problems gradually deteriorated. (PX 2, p. 7-8). He last saw decedent on April 22, 2008 after he was discharged from the hospital to have hospice care and comfort at home. Decedent had pneumonia which had some resolution by the time of his discharge. He was sent home on antibiotics. Dr. Partridge said that decedent's CWP and COPD made him more susceptible to pneumonia and made recovery from pneumonia more difficult. They diminished his respiratory reserve and caused hypoxemia. (p. 10-12). When organs are deprived of oxygen they deteriorate. Decedent was on several breathing medications. Based on his knowledge as decedent's treater, Dr. Partridge felt the major factor in death was multifactorial respiratory collapse, with CWP, COPD, emphysema, and lung cancer being causative factors. Decedent's overall body burden killed him. (p. 13-15). Dr. Partridge felt death was hastened by decedent's total body burden including heart trouble, COPD, and emphysema. (p. 37).

Pulmonologist, Dr. Joseph Renn, reviewed various medical records and testified on behalf of the Respondent. (RX 1, Resp. Depo. EX 2, p. 1). Dr. Renn has not treated patients since January of 2003, retiring from active practice at that time. (RX 1, p. 23). He is a "forensic medical examiner." (p. 4). Dr. Renn tied the decedent's death to multiple factors including the cancer, heart attacks, further damage to an already damaged heart, and pneumonia. (RX 1, p. 10). He stated Decedent's heart failure was not related to coal dust because it was left sided. Coal mine dust would produce right sided heart failure. (p. 11-12). Dr. Renn disagreed with decedent's treaters. He disagreed with Dr. Partridge, and concluded that death was much more likely due to a heart attack and intractable heart failure. He disagreed with Dr. Houser that decedent's lung disease played a role in death. He disagreed with decedent's oncologist Dr. Domingo that decedent was a poor surgical candidate because of his cardiac and respiratory conditions. (p. 13; Depo. Ex. 2, p. 7). Dr. Renn stated that decedent's respirations had improved up to the time his cancer was found. However, decedent was inoperable because the lung mass had spread to the chest wall and was too far gone. (p. 14). Dr. Renn stated that none of decedent's pulmonary disease affected his gas exchange from August 17, 1999 to February 16, 2008. PFTs from April 16, 1999 through March 23, 2007 showed improvement. He felt "there just could have been no contribution whatsoever" from his CWP, COPD, and emphysema to the respiratory collapse implied by Dr. Partridge. (p. 15-16). However, Dr. Renn agreed coexisting heart and lung problems increase the risk for sudden cardiac events and make recovery from them more difficult. (p. 24-25). He agreed that the chronic lung disease puts one at a higher risk to develop and then recover from pneumonia. (p. 39).

Dr. Domingo's records documented decedent's radiation therapy for lung cancer and eventually brain cancer. (PX 11). Dr. Domingo kept in contact with Dr. Partridge regarding his treatment. On December 13, 2007 decedent had completed palliative radiation for his brain tumor. (p. 17). On November 28, 2007 Dr. Domingo stated "Considering his known severe COPD and cardiac disease he is a high risk of surgery hence his referral back to us for consideration of palliative brain irradiation." (p. 18). Dr. Domingo also stated decedent's lung cancer was inoperable because of his COPD and cardiac disease. (p. 20-22). On April 9, 2007 given the poorly differentiated tumor and comorbid conditions which resulted in his poor prognosis, the treatment was to improve his quality of life and obtain tumor control. (p. 24). At that time Decedent's lungs had coarse distant breath sounds due to COPD. (p. 22).

Ohio Valley Heart records were also admitted into evidence. They reflect treatment of decedent's cardiomyopathy and associated heart issues. These records note the Petitioner's January 30, 1997 pulmonary testing showed air trapping, hyperinflation, mild hypoxemia, and a mild obstructive defect that improved with bronchodilators. (p. 33). September 11, 1996 testing showed mild obstruction, but a lung age of 85 years. (p. 57). Cardiomyopathy and chronic lung disease were noted on April 23, 1997. Decedent was dyspneic with minimal exertion and had scattered wheezes and rhonchi bilaterally. (p. 2). On May 1, 2001 exertional dyspnea continued; he was still being seen by Dr. Houser for his CWP. (p. 6).

Treating Oncologist, Dr. Concepcion's, records reflect decedent's chemotherapy, and declining health with cancer metastasis to the brain. Chronic bronchitis, black lung, and COPD appear throughout the records. Globally diminished breath sounds are noted on several entries, with crackles also noted. On October 23, 2007 it was noted that he has been started on home oxygen at bedtime and nebulizers. (p. 60). His baseline symptoms have improved on nebulizers and oxygen. (p. 62). He was advised to use round the clock oxygen. (p. 63).

Records from Ferrell Hospital contain entries regarding decedent's April of 2008 admissions for rib fractures, pneumonia and chest pain. On April 9, 2008 decedent had fallen after getting up to go to the bathroom. There was no chest pain or seizure prior to falling. He had been getting very weak with chemotherapy. He had a chronic harsh cough and intermittent hemoptysis. On April 15, 2008 it was noted decedent's pneumonia had improved, but he developed chest pain and transferred to acute care and had an acute inferolateral infarct. He was more lethargic and had continued bibasilar rales. On April 17, 2008 Dr. Moore increased oxygen to 3 liters per nasal cannula with humidified oxygen. (PX 14, p. 3-4). A chronic harsh cough was noted on April 19, 2008 with diaphoretic skin and slightly diminished lung sounds. Decedent was a DNR. By the April 22, 2008 he and his family agreed on home care with VNA Hospice. (p. 10). Dr. Moore's consultation of April 16, 2008 noted decedent's chest had diminished breath sounds throughout with expiratory wheezing. (PX 14, p. 11). Decedent's angina post infarct was concerning, but given decedent's metastatic disease and continued deterioration he would avoid getting too aggressive with treatment. He decided to push medications and hope things settled down. Another infarct was possible, but decedent's chance of surviving it would be good. (p. 12). Other testing was included in these records. (p. 16-22, 25-34).

VNA Hospice Records detail decedent's declining condition at home. In addition to his respiratory symptoms and eventual respiratory cessation, his problems included an inability to eat, seizures with leg paralysis, and a reduced heart rate. On April 22, 2008 decedent was very weak and dyspneic with minimal exertion. He was oxygen dependent, bedbound, and lethargic. (PX 16, p. 23). From April 23, 2008 until May 7, 2008 decedent's lung sounds were diminished and oxygen saturations varied, from 84% to 93% on 2 liters of oxygen. The records from this provider indicate Petitioner passed away on May 11, 2008.

CONCLUSIONS OF LAW

1. For purposes of this claim, both Sheila Griffith and her daughter Tabitha Griffith are the appropriate Petitioners in this case. The Arbitrator finds that Tabitha Griffith is a dependent child who is physically incapacitated under Section 7(a) of the Act. The application for adjustment of claim is hereby amended sua sponte to conform to the proofs and add Tabitha as a party based on the findings herein.

2. Petitioners filed their claim on December 31, 2008 thereby providing notice. *Crane Company v. Industrial Commission*, 32 Ill. 2d 348, 205 N.E. 2d 425, 427 (1965). Respondent has failed to show it was substantially prejudiced by the timing of this notice as required by the Act. 820 ILCS 310/6(c). All parties had medical records material available for expert opinions. In addition, the Act requires notice of the disabling disease, not death, which Respondent had by virtue of the prior disability claim. 820 ILCS 310/6(c).

3. Petitioners sustained their burden of proof regarding the issue of whether an occupational disease existed that arose out of the decendent's employment with Respondent. In this case, there was a prior final decision by the Commission and affirmed through the Illinois Appellate Court finding the decedent was totally disabled by occupationally related chronic bronchitis, COPD and CWP during his lifetime. Under Section 19(j), the prior final decision regarding decedent's disability claim, "shall be taken as final adjudication of any of the issues which are the same in both proceedings." 820 ILCS 310/19(j).

4. Petitioners sustained their burden of proof regarding the issue of causation. The Arbitrator finds persuasive the opinions of decedent's two treating physicians, as well as those of the multiple consulting physicians on this issue. "Death is compensable under the Act so long as the decedent's employment was a causative factor. His employment need not be the sole cause or even the primary cause; it is sufficient if it is a cause." *Freeman United Coal Mining Co. v. IWCC*, 386 Ill. App. 3d 779, 901 N.E. 2d 906, 912 (4th Dist. 2008). So long as it was a factor in hastening death, compensation is appropriate. *Freeman United Coal Mining Co. v. Industrial Commission*, 308 Ill. App. 3d 578, 720 N.E. 2d 309, 315 (5th Dist. 1999). In *Proctor Community Hospital v. Industrial Commission*, 41 Ill. 2d 537, 244 N.E. 2d 155, 158, (1969), the Supreme Court stated that even though the ultimate outcome of the worker's heart condition likely would have been his death at some future time, and possibly under non-employment related circumstances, it would not invalidate an award where the occupation hastened death. In the present case, there was abundant evidence that decedent's work-related lung diseases weakened him further and contributed to and/or hastened his death as concluded by primary care physician Dr. Partridge and treating pulmonologist Dr. Houser. Although the Respondent did provide a viable defense via the expert opinions of Dr. Renn, those opinions are not persuasive in light of the prior Commission decision in this matter as well as the overwhelming medical evidence from Petitioner's treating physicians.

5. Respondent shall pay death benefits, commencing **March 11, 2008**, of **$520.00**/week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, ***Sheila Griffith*** shall be paid $260.00 in weekly benefits on her own behalf . Sheila Griffith's benefits shall continue, until ***$250,000 has been paid or 20 years*** , whichever is greater. ***Tabitha Griffith*** shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child, for the duration of her incapacity.

6. Respondent shall pay ***$8,000.00*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

14IWCC0358

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Geneda Bauman,

Petitioner,

vs. NO: 08WC 56041

Renaissance Care Center,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, permanent disability, rate, medical expenses and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 28, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC0358

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 15 2014

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

RWW:bjg
0-4/22/2014
046

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAUMAN, GENEDA
Employee/Petitioner

Case# **08WC056041**

RENAISSANCE CARE CENTER
Employer/Respondent

14IWCC0358

On 10/28/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1824 STRONG LAW OFFICES
TODD A STRONG
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2337 INMAN & FITZGIBBONS
G STEVEN MURDOCK
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

14IWCC0358

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☒ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

GENEDA BAUMAN,
Employee/Petitioner

v.

RENAISSANCE CARE CENTER,
Employer/Respondent

Case # **08** WC **56041**

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **February 21, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On **November 10, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$34,954.00**; the average weekly wage was **$672.19**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has in part*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$36,604.58** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$12,105.00** for other benefits, for a total credit of **$48,709.58**.

Respondent is entitled to a credit of **$ 0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$448.35**/week for **202** weeks commencing **November 11, 2008** through **September 25, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of **$448.35**/week for life, commencing **September 26, 2012** as provided in Section 8(f) of the Act.

Respondent shall pay to Petitioner reasonable and necessary medical services of **$282,817.08,** subject to the provisions of the medical fee schedule, pursuant to Section 8(a) and 8.2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

JOANN M. FRATIANNI
Signature of Arbitrator

October 18, 2013
Date

OCT 28 2013

F. Is Petitioner's current condition of ill-being causally related to the injury?

L. What is the nature and extent of the injury?

Petitioner testified she is currently 56 years of age, earned a high school diploma and received LPN certificate from Spoon River College. Petitioner has been employed as an LPN since 1978, primarily in nursing homes providing medical services to elderly patients, along with others suffering physical and mental disabilities. Petitioner testified she has received awards for nurse of the year as well as Humanitarian of the Year during her career.

Petitioner further testified that on November 10, 2008, she was an LPN for Respondent. Respondent runs a facility that provides residential life care services for the elderly as well as the mentally and physically disabled. Petitioner had been so employed by Respondent for approximately 8 years prior to that date.

Petitioner further testified she was in charge of CNA's working for Respondent and was responsible for direct contact with physicians of the patients at that facility, should there be any change in their medical conditions.

On November 10, 2010, Petitioner was working in the pediatric wing of Respondent's facility. This wing housed 33 child patients, only four of which were ambulatory. Petitioner testified this work called for constant twisting, bending and kneeling to replace tubes and feeding bags. Petitioner testified there was a minor resident who was 12 years old and weighed 68 pound. This minor had a propensity of climbing on others, including staff members. Petitioner testified she and other employees were aware of his behavior, and would attempt to redirect him if he tried to climb on anyone. Petitioner testified that while she had her back to this minor on that date, he ran to her and jumped on her back and pulled her hair, pulling her neck back while she twisted to try to grab the minor to stop him from pulling on her hair and head. At that time, she experienced a popping sensation in her neck.

Petitioner testified this incident was reported immediately to Ms. Jennifer Spencer, her supervisor, after the minor patient was brought under control.

The next day, Petitioner sought treatment with Dr. Phillips, her personal physician. Petitioner testified that Ms. Spencer, her supervisor, directed her to follow up with Dr. Phillips, who is also affiliated with Respondent's nursing home. When she first saw Dr. Phillips, Petitioner complained of headaches, a scalp abrasion, neck pain, low back pain and left sided weakness. Dr. Phillips took Petitioner off of work and prescribed conservative care.

On December 12, 2008, Petitioner was seen at the emergency room of Graham Hospital, where she reported a work injury of hair being pulled by a client. Petitioner complained of right sided cervical pain, right shoulder pain with pain radiating down the arm to the hand. Petitioner was advised to see her primary physician. Petitioner also visited that same emergency room on February 25, 2008, November 22, 2009, March 11, 2010, July 22, 2010, March 30, 2012 and May 24, 2012, primarily for complaints of pain.

Petitioner also had multiple emergency room visits at Methodist Medical Center for the same symptoms. Petitioner also had multiple emergency room visits at OSF St. Francis Medical Center for the same symptoms.

Petitioner also sought treatment with Dr. Yibling Li on December 17, 2008. Dr. Phillips referred Petitioner to Dr. Li. Dr. Li prescribed an MRI of the head and brain. The MRI of the brain was performed on January 14, 2009, and the findings were unremarkable. Dr. Li diagnosed discogenic neck pain with a disc herniation at L4-L5 and a sprain at the S1 joint.

Petitioner also sought treatment with Dr. Hoffman on February 26, 2009. Petitioner began treating with Dr. Hoffman on her own. Dr. Hoffman prescribed a cervical MRI. This was performed on December 3, 2008. This revealed cervical disc herniation at C4-C5. Dr. Hoffman prescribed a lumbar MRI. This MRI was performed on February 28, 2009, and revealed and revealed a lumbar disc protrusion at L5-S1 with multi-level lumbar degenerative disc disease. Dr. Hoffman diagnosed a cervical strain, lumbar strain with herniated disc at L5-S1 with radiculopathy to the left leg. On March 8, 2010, Dr. Hoffman prescribed an ultrasound.

Petitioner also saw Dr. Trudeau on March 10, 2009. This referral was made by Dr. Hoffman. Dr. Trudeau performed an EMG/NCV study that revealed a left S1 radiculopathy, left C7 radiculopathy, and a right C6 radiculopathy, which he described as severe in nature.

Petitioner was also referred to see Dr. Blair Rhode for her right shoulder complaints. This referral was by Dr. Hoffman. Dr. Rhode, an orthopedic surgeon, saw her on April 2, 2009 and diagnosed neck pain, low back pain, cervical radiculopathy, and spondylolisthesis, which he felt was related to this accidental injury. Dr. Rhode referred Petitioner to see Dr. Kube, an orthopedic surgeon specializing in spines. Petitioner saw Dr. Kube on April 2009, and diagnosed degenerative disc disease and hyperextension injury causing a bruise or irritation to the nerve root. Dr. Kube felt this condition was aggravated by the accidental injury.

Petitioner was referred to see Dr. Bond, an ophthalmologist. Petitioner first saw Dr. Bond on April 20, 2009. Dr. Bond noted complaints of "black spots" in her vision and Dr. Bond recommended treatment by a neurologist.

Petitioner was also referred to see Dr. Mulconery, an orthopedic surgeon. This referral was made by Dr. Demaceo Howard. Dr. Mulconery saw Petitioner on November 20, 2009 and diagnosed a cervical work related injury, axial neck pain, and prescribed continuing neurologic care. Dr. Mulconery suggested that Petitioner return to Dr. Lee, a neurologist.

Dr. Hoffman then referred her to Dr. Russo for a neurologic consult. Petitioner first saw Dr. Russo on December 15, 2009. Dr. Russo diagnosed cervical and lumbar degenerative disc disease, prescribed physical limitations and physical therapy.

Petitioner underwent a cervical myelogram on February 7, 2011. Dr. MacGregor, a neurosurgeon, prescribed this test. Petitioner was referred to see Dr. MacGregor by Dr. Lee. The myelogram revealed multiple level cervical radiculopathy.

On February 11, 2011, Petitioner sought the service of the Illinois Department of Rehabilitation Services. An assistant, MR. Stewart Nyi, was assigned to assist her and reviewed her home environment. He made certain suggestions for home safety, including techniques and guidance so that she could continue to live in her own home alone. The Department also provided assistance in the form of a housekeeper to perform daily chores in the house.

Petitioner then returned to see Dr. MacGregor, a neurosurgeon, on February 17, 2011. Dr. MacGregor prescribed fusion surgery to the spine. On April 1, 2011, Petitioner underwent surgery with Dr. MacGregor in the form of an anterior cervical decompression and two level fusion at C4-C5 and C5-C6.

Petitioner remains under the care of Dr. Lee. Dr. Lee testified by evidence deposition that the cervical pathology which necessitated fusion surgery, and the separate and distinct injury to the brain stem to be analogous to a concussion, accounting for the multiple constellation of complaints. On August 23, 2011, Petitioner under a maxillofacial CT scan to rule out a maxillofacial component to the injury. This CT scan was prescribed Dr. Lee, and revealed a brain stem injury with multiple cervical surgeries.

On September 12, 2012, Petitioner underwent a cervical spine MRI. This was prescribed by Dr. MacGregor, and revealed post-operative nerve root compression.

With the above blizzard of medical treatment, Petitioner introduced into evidence opinions of her many treating physicians as to the issue of nature and extent of her disability. Dr. Lee felt she was permanently and totally disabled from work in his May 15, 2000 note. Dr. MacGregor felt Petitioner was permanently and totally disabled from work in her note dated May 9, 2012. Dr. Rennick, her current primary care physician, felt that she is permanently and totally disabled from work in his note dated April 13, 2012.

Dr. MacGregor testified by evidence deposition that the basis for her prescription for cervical fusion surgery was cervical instability. She noted Petitioner had been undergoing muscle wasting and atrophic changes in her hands. Dr. MacGregor also reviewed the examination findings of Dr. Graf, and contested same during her testimony.

Dr. Lee testified by evidence deposition that he diagnosed degenerative changes in the cervical spine, left sided weakness and pain, a herniated disc, and spinal cord irritation secondary to a traumatic injury. Dr. Lee also diagnosed right C6 radiculopathy and left C7 radiculopathy, and observed muscle wasting and atrophy to her left arm and hand. Dr. Lee noted decreased range of motion to the left arm, neck and left side, along with left sided weakness. Dr. Lee felt that Petitioner could only walk short distances and should use a cane. Dr. Lee felt these conditions were causally related to the accidental injury of November 10, 2008. Dr. Lee further felt the brain stem injury could account for the multiple constellation of symptoms.

A vocational rehabilitation expert, Mr. Bob Hammond, was of the opinion that Petitioner is totally and permanently disabled from work in his report dated September 25, 2012.

Mr. Jim Ragains, a vocational expert, also consulted with Petitioner. This consultation took place at the request of Respondent. Mr. Ragains indicated that he had no vocational recommendations to offer, and felt that if the "finder of fact" finds the treating physician opinions as to permanent and total disability to be correct, then the opinions he tendered regarding employability would be "moot."

As indicated above, Petitioner has been treated by multiple physicians following this accidental injury, who have performed a battery of tests, prescribed physical therapy and performed surgery. Most of them have rendered opinions that the conditions of ill-being as described above, are causally related to the accidental injury of November 10, 2008.

Respondent arranged for Petitioner to be examined by two physicians. Dr. Graf examined her on June 2, 2011, and felt she was capable of returning to work as an LPN. Dr. Levin examined her on August 30, 2012, and also felt she was capable of returning to work as an LPN. Dr. Levin felt that Petitioner was malingering or fabricating her symptoms. Dr. Levin is the only physician to reach that conclusion.

Dr. Levin testified by evidence deposition that there was "absolutely no evidence of neurologic abnormality" of Petitioner. Dr. Levin was unable to offer an opinion as to why the EMG/NCV study performed by Dr. Trudeau was positive for radiculopathy, and admitted to not reviewing the multiple MRI films, the myelogram films or the CT scan films when rendering her opinion. Dr. Levin also admitted to not reviewing the operative report and it was her understanding Petitioner underwent a cervical decompression only, and not a fusion.

The Arbitrator finds the opinions and findings of the treating physicians in this matter to be far more credible than the opinions of Dr. Graf and Dr. Levin under these circumstances.

Petitioner during the hearing testified to currently experiencing weakness to her left side, left leg and left arm. She uses a cane to ambulate and takes multiple prescribed medications including Permarin, Norco, Tizanidine, Protonix, Baclofen, Oxaprozin, Pro-Air inhaler, Xopenox, Gabapentin, Oxycodone, Alprazolam, Prochlorperazine, Fluticasone, along with aspirin, other over the counter medications and vitamens.

Petitioner testified that she did not have any medical treatment to her neck or cervical spine prior to November 10, 2008. Petitioner testified she experienced a lower back strain for which she consulted a physician in 2006. Petitioner lost no time from work from that episode. Petitioner further testified she never had a workers' compensation claim prior to this matter, or any other type of personal injury claim. The medical evidence introduced into evidence supports this testimony.

Based upon the above, the Arbitrator finds that the above conditions of ill-being are causally related to the accidental injury of November 10, 2008.

Based further upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner's condition of ill-being became permanent in nature, rendering her totally and permanently disabled from any gainful employment, commencing September 26, 2012.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence the following medical charges that were incurred after this accidental injury:

Advanced Rehabilitation and Sports Medicine	$ 4,229.00
Canton Radiology Services	$ 505.00
Central Illinois Radiological Services	$ 5,168.55
Clinical Radiologists	$ 715.50
Comprehensive Emergency Solutions	$ 450.00
Fulton County Emergency Medical Associates	$ 893.50
Graham Hospital	$51,964.85
Graham Medical Group	$ 2,243.00
Heartcare Midwest	$ 180.00
Dr. Daniel Hoffman	$ 3,270.00
Illinois Neurological Institute	$ 924.00
Illinois Workers' Pharmacy	$12,978.72
Methodist Medical Center	$49,516.70
Memorial Medical Center	$58,599.95
Midwest Emergency Department Specialists	$ 664.00
Midwest Urological Group	$ 202.00
Orland Park Orthopedics	$ 1,207.92
OSF Healthcare	$29,343.60
Pathology Associates of Central Illinois	$ 229.40
Peoria Open MRI	$ 1,425.00
Peoria Tazwell Pathology Group	$ 317.60
Prairie Spine & Pain Institute	$ 808.00
Springfield Clinic	$50,789.67
Dr. Edward Trudeau	$ 4,080.00
Out of Pocket Expenses by Petitioner	$ 2,211.12

These charges total $282,817.08.

See findings of this Arbitrator in "F" and "L" above.

Based upon said findings, the Arbitrator finds that the above medical charges represent reasonable and necessary medical care and services designed to cure or relieve the condition of ill-being caused by this accidental injury. Respondent is found to be liable to Petitioner for all of the above charges so listed.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" and "L" above.

Petitioner claims that as a result of this accidental injury she became temporarily and totally disabled from work commencing November 10, 2008 through January 15, 2013, and is entitled to receive temporary total disability benefits from Respondent for this period of time. Respondent disputes all periods of temporary total disability.

Mr. Bob Hammond, a vocational expert, consulted with Petitioner and authored a report dated September 25, 2012. Mr. Hammond reviewed certain medical records and interviewed Petitioner. Following this consultation, Mr. Hammond was of the opinion that Petitioner was permanently and totally disabled from work.

Mr. Jim Ragains, a vocational expert, also consulted with Petitioner. This consultation took place at the request of Respondent. Mr. Ragains indicated that he had no vocational recommendations to offer, and felt that if the "finder of fact" finds the treating physician opinions as to permanent and total disability to be correct, then the opinions he tendered regarding employability would be "moot."

Based upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner reached maximum medical and vocational improvement on September 25, 2012. Based further upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner became temporarily and totally disabled from work commencing November 11, 2008 through September 25, 2012, and is entitled to receive temporary total disability benefits from Respondent for this period of time.

M. Should penalties or fees be imposed upon Respondent?

This Arbitrator admittedly has spent months reviewing the voluminous testimony, medical records, medical opinions, vocational opinions and medical charges incurred in this matter. It has been an extremely time consuming effort, and the Arbitrator respects the extraordinary efforts of the parties in attempting to prove and defend the voluminous evidence presented.

Petitioner requests penalties and attorneys fees in this matter.

Although the Arbitrator found the opinions of Dr. Graf and Dr. Levin to be less than credible than the opinions of the treating physicians, the fact of the matter remains concerning the medical care in this case, which often was driven by emergency room visits for pain treatment, resulting in multiple treating physicians with multiple ideas and efforts to treat the conditions found.

In addition, vocational expert Mr. Jim Ragains indicated his assessment in this matter.

Under these circumstances, all claims for penalties and attorneys fees in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Loretta Bandy,
Petitioner,
vs.

14IWCC0359
NO: 12 WC 44165

Continental Tire of the Americas Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
KWL/vf
O-5/6/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0359

BANDY, LORETTA
Employee/Petitioner

Case# 12WC044165

CONTINENTAL TIRE OF THE AMERICAS INC
Employer/Respondent

On 11/13/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0299 KEEFE & DePAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ ~~Injured Workers' Benefit Fund (§4(d))~~
☐ ~~Rate Adjustment Fund (§8(g))~~
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0359

Loretta Bandy
Employee/Petitioner

v.

Continental Tire of The Americas, Inc.
Employer/Respondent

Case # **12** WC **044165**

Consolidated cases: ___

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **10/02/13**. By stipulation, the parties agree:

On the date of accident, **06/27/12**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $**35,275.24**, and the average weekly wage was $**678.37**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **1** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $**7,326.36** for other benefits, for a total credit of $**7,326.36**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$407.02**/week for a further period of **41** weeks, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **20% loss of use of the left hand**.

Respondent shall pay Petitioner compensation that has accrued from **01/28/13** through **07/04/13**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11/4/13
Date

NOV 13 2013

14IWCC0359

FINDINGS OF FACT

Petitioner was working for Respondent on June 27, 2012, when she was attempting to move a stuck tire and felt a pop and crack in her left wrist and hand. She testified that she had no prior problems or injuries to this part of her body. Petitioner is right hand dominant.

After a course of conservative treatment Petitioner underwent surgery with Dr. David Brown on September 27, 2012, for an arthroscopic procedure to address the TFCC and a left wrist synovectomy. Dr. Brown released her to light duty on October 8, 2012, and recommended physical therapy. Ultimately she was released to full duty and placed at maximum medical improvement on January 28, 2013. Dr. Brown indicated at that time she had occasional swelling at the end of a work shift, but overall was doing well. He instructed her to return to him if she had additional problems. She testified that she sought no additional medical treatment after this appointment.

On April 30, 2013, Petitioner was evaluated by Dr. James Williams at the request of Respondent. Dr. Williams drafted a report and testified in this matter at bar. Petitioner complained to Dr. Williams of stiffness, cramping, and swelling of the wrist with tingling and numbness in the last two fingers of the hand. Dr. Williams reviewed the treatment records of Petitioner as a component of his exam and pointed out that the operative report of Dr. Brown was inconsistent with a diagnosis of a tear of the TFCC as debriding of the synovitis and debriding of fraying of the TFCC was done, with an additional note that probing confirmed there was no tear of the TFCC. Dr. Williams concluded that Petitioner had one of two AMA ratings. The rating for her condition without an actual tear of the TFCC would be 2% of the left upper extremity and with a confirmed tear of the TFCC a rating of 9% of the left upper extremity would be accurate.

At trial Petitioner stated she recently bid into a lower paying position with Respondent because she felt the position was less physically demanding considering her continued complaints after being released by Dr. Brown. She admitted Dr. Brown opined that she required no restrictions when he last saw her and she sought no medical treatment after the January 28, 2013, visit with Dr. Brown. She testified that it was a voluntary change of jobs and the hourly rate of pay was the same, but she did not qualify for weekend work at the new position which was equal to an extra one dollar an hour. While she also testified she did not get overtime hours in the new position, she admitted she had only worked the new position since August 26, 2013, and that the entire plant was recently on a status similar to a temporary layoff because of reduced production. She admitted she could not accurately judge the possibility of overtime in the future in this new position.

Petitioner testified that she has had an improvement, with reduced swelling and better sleep than when she last saw Dr. Brown. She also stated she had a reduction in popping and cracking in the wrist as well as less cramping. She did state that she felt she had reduced range of motion with extension and did not feel her left hand was as strong as her right hand. She testified she was right-handed. She also testified that she avoided picking up her grandchildren, ages 4, 5, and 7. She made no complaints or mention of numbness or tingling at trial, contrary to her complaints voiced to Dr. Williams.

CONCLUSIONS OF LAW

The only issue in dispute at trial was the Nature and Extent of Petitioner's injuries. The Act sets forth in §8.1b(b) the criteria for determining Permanent Partial Disability for injuries occurring after September 1, 2011.

The first factor is an AMA impairment rating. In this matter the only rating presented at trial was that of Dr. Williams, which found either 2% impairment at the level of the left upper extremity, or 9% impairment at the level of the left upper extremity depending on the interpretation of the surgical procedure done by Dr. Brown. The record reflects that Dr. Williams is the only physician to provide an AMA rating.

The second factor to be determined is Petitioner's occupation. At the time of trial Petitioner was an End Line Inspector. She explained this job as visually inspecting tires and stamping them. This was a less physically demanding job than she performed at the time of the injury. The job change was voluntary as she was released by Dr. Brown to full duty work at his last visit.

The third factor is Petitioner's age at the time of the injury. Petitioner was 46.

The fourth factor to be considered is Petitioner's future earning capacity. Petitioner conceded that she is making the same hourly rate of pay as prior to the accident, with the exception of no weekend work and an uncertainty of overtime in the future. Petitioner admitted she was cleared by Dr. Brown to return to her prior job at the end of Dr. Brown's treatment and further admitted she worked that prior job up until August 26, 2013, when she voluntarily took the new position.

The fifth and last criterion is evidence of disability in the treatment records. The treatment for Petitioner's injury included an arthroscopic procedure to the left wrist. This included Dr. David Brown on performing an arthroscopic procedure to address the TFCC and a left wrist synovectomy. Dr. Williams reviewed the treatment records of Dr. Brown and testified that the operative report of Dr. Brown was inconsistent with a diagnosis of a tear of the TFCC. The operative report notes debriding of the synovitis and debriding of fraying of the TFCC. The operative report goes on to additionally note that probing confirmed there was no tear of the TFCC.

Based upon the undisputed evidence presented at trial and after considering the five factors indicated above, the Arbitrator finds that the Petitioner has suffered 20% Permanent Partial Disability to the left hand in accordance with Sections 8(e)(9) and 8.1 the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0360

Randall Patrick Smith,
Petitioner,

vs.

NO: 11 WC 31068

State of IL Dept of Correction Hardin County Work Camp,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed Seotember 11, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAY 16 2014
KWL/vf
O-5/6/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0360

SMITH, RANDALL PATRICK
Employee/Petitioner

Case# 11WC031068

SOI DEPT OF CORRECTIONS/HARDIN COUNTY WORK CAMP
Employer/Respondent

On 9/11/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2546 FEIST LAW FIRM LLC
KREIG B TAYLOR
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

SEP 11 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0360

RANDALL PATRICK SMITH
Employee/Petitioner

Case # 11 WC 31068

v.

STATE OF IL, DEPT. OF CORRECTIONS/HARDIN COUNTY WORK CAMP
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **August 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

14IWCC0360

FINDINGS

On **July 8, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**56,658.00**; the average weekly wage was $**1,089.58**.

On the date of accident, Petitioner was **41** years of age, *married* with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**N/A**.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove the issue of accident. No benefits awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

9/10/13
Date

SEP 11 2013

FINDINGS OF FACT

Petitioner is a 41 year old correctional officer who has worked for the Respondent since 1998. On July 8, 2011, Petitioner was working in the mail room. Petitioner testified that he was sitting on an office chair. He described pivoting in the chair and then experiencing a pop in his right knee.

Petitioner completed an Employee's Notice of Injury on July 8, 2011. (RX2) He reported the injury occurred when "I turned while sitting in the chair. My foot was planted in one spot and twisted my knee." (RX2) Petitioner also reported the same mechanism of injury on July 8, 2011 on the State of Illinois Department of Correction Incident report and the Illinois Form 45. (RX6 & RX7)

Petitioner presented to Jennifer Price, PA-C at Primary Care Group on July 8, 2011. Petitioner gave a history of right knee pain which began when he was "sitting in a chair this morning at work in the mail room at approximately 8:30 am and started to turn. His foot stayed planted, but his knee turned. He felt sudden pain." (PX3) His medical history was significant for right ACL repair in 1992. X-rays were ordered for the right knee, which showed no acute bone abnormality, mild osteoarthritis, status post anterior cruciate ligament repair with orthopedic hardware in place and intact. (PX3) Petitioner was diagnosed with a knee sprain and it was reported that swelling had improved but Petitioner was still having some pain and stiffness. After four follow-up appointments, on July 21, 2011, Petitioner was referred to Dr. Richard Morgan.

Petitioner presented to the VA Medical Hospital on August 3, 2011. (PX1) He underwent an MRI scan on August 10, 2011. The impression of the imaging study was of medial meniscus tear, marrow edema medial tibial plateau.

On August 18, 2011 Petitioner completed an intake form for Southern Illinois Orthopedic Center. (PX6) He reported that his chief complaint was severe knee pain and that he injured himself by "[t]urning in swivel chair with right foot planted on floor and poped my knee." (sic) (PX6) On August 25, 2011 Petitioner presented to Dr. Richard Morgan an orthopedic surgeon. Dr. Morgan took a history of "[h]e was injured in the early part of July when he was sitting at a swivel chair. He turned to pivot to reach around to a mail bag and injured his right knee." (PX6) Dr. Morgan's impression was status post ACL with an acute medial meniscal tear. He planned to do a right knee arthroscopy. (PX6)

On September 28, 2011 Petitioner underwent an arthroscopy of right knee with partial medial meniscectomy. (PX6) Following surgery Dr. Morgan ordered physical therapy for Petitioner three times a week for four weeks. Petitioner presented to physical therapy for an initial evaluation on October 6, 2011. He gave a history of "had foot planted and pivoted; heard a 'pop' and felt pain in knee". (PX5) On October 11, 2011, Dr. Morgan noted that Petitioner could return to work on October 17, 2011 with no restrictions. (PX6) On February 2, 2012, Petitioner reported a little ache at the end of the day but did not take pain medication for it. Dr. Morgan discharged the Petitioner from care and reported that he would see him back as needed. (PX7)

Dr. Morgan testified via evidence deposition on October 25, 2012. He testified that he believed the condition of Petitioner's right knee was related to his July 8, 2011 incident at work and acknowledged that his opinion was based solely on the history provided to him by the Petitioner. (PX9, pgs. 10-11) Dr. Morgan also agreed that a bucket handle tear of the meniscus could occur in the normal course of daily activities. (PX9, pg. 11) He did not believe that Petitioner's diagnosis of chondromalacia was related to his work incident. (PX9, pg. 11) He described the symptoms of chondromalacia as usually being anterior knee pain, pain getting up from a chair, and climbing stairs. (PX9, pg. 12) Dr. Morgan testified that the Petitioner did very well after surgery. (PX9, pg. 12)

Petitioner testified at arbitration on August 16, 2013. Petitioner first testified that he was injured on July 8, 2011 while he was sitting in a swivel chair. He further described that while he was reaching to his right, his right knee got caught on a hole in the floor. And as he pivoted in the chair, he popped his right knee. Petitioner also testified this occurred when performing his normal duties in the mail room.

During cross-examination Petitioner was asked why his Employee's Incident report, Report of Injury, medical records with Jennifer Price, PA-C, or medical records from Dr. Morgan did not mention a "hole in the floor". (Tr.20) Petitioner did not explain the discrepancy. He later explained that his right knee got planted on the floor as he turned.

Respondent called John Mott as a witness. John Mott has been employed at Hardin County Work Camp for 13 years as the Superintendent. Mr. Mott testified that Hardin County Work Camp used to be a school and the mail room was used as a kitchen at that time. (Tr.31-32) Mr. Mott further testified the drain shown in Petitioner's Exhibit 12 has been there since Hardin County Work Camp was a school. (Tr.32) Mr. Mott testified the particle board and rug were in place to make the ground level. (Tr.33)

Petitioner testified that he still experiences pain on a regular basis with regards to his right knee. He testified that he is not allowed to do any high impact activities. His medical records do not reflect any restriction or continued complaints of this nature. Petitioner does not currently take any medication for his right knee. He has received good yearly performance evaluations since returning to work and that he has had no complaints from his supervisors.

CONCLUSIONS OF LAW

The Arbitrator finds that the Petition failed to meet his burden of proof regarding the issue of accident. In this case, the Petitioner testified that he injured his knee when he turned or pivoted in his office chair. There was no evidence that there was any increased risk of injury, such as a defect in the chair, that would have caused Petitioner's injury. Although the Petitioner testified regarding his foot getting caught in a hole in the floor, all of the initial records do not support this claim. Petitioner's initial testimony indicated he injured his leg while he was turning or pivoting in a chair, and his later testimony made reference to a hole in the floor. Given the Petitioner's different versions of his mechanism of injury, the Arbitrator is persuaded by the medical records and the accident reports taken soon after the incident, in which there is no mention of any hole in the floor. As such, the Arbitrator finds that the mere act of turning or pivoting in an office chair does not rise to the level of an accident, as such an activity did not expose Petitioner to a greater risk than that to which the general public is exposed.

Accordingly, this claim is denied and all other issues are rendered moot.